Silver State Disposal Service, Inc. *and* Howard Clemons, *and* Caesar Adamson, *and* Bernard Peter Williams, *and* Albert Crockett. Cases 28–CA–12361, 28–CA–12365, 28–CA–12365–2, and 28–CA–12595

August 19, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On August 9, 1995, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed a brief in opposition to the General Counsel's exceptions.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The judge found, inter alia, that the Respondent violated Section 8(a)(3) and (1) by terminating 71 employees for engaging in a work stoppage on January 5, 1994. We adopt the judge's finding that the terminations were unlawful for the reasons that follow.

The Respondent is engaged in the business of waste hauling and disposal in Las Vegas, Nevada. Its employees are represented by Teamsters Local 631 and are covered by a collective-bargaining agreement between the Respondent and the Union. The agreement includes, inter alia, a no-strike clause which provides, in pertinent part:

> The Union shall neither call, encourage nor condone any work stoppage, work slowdown, or picketing of the Employer's several premises or its trucks; and the Employer will not lockout the employees covered by this Agreement.
>
> The Employer agrees that he shall not compel any employee covered by this Agreement to cross any primary picket lines established against other employers and sanctioned by Teamsters Local # 631 [the Union]. However, the Union and the Company, realizing the Company's obligation to maintain uninterrupted service in the interest of public health and safety, will attempt to obtain permission from the striking Union for safe passage through said primary picket line wherever necessary. The Union shall give the Employer twenty-four (24) hours written notice of any sanctioned primary picket line. It shall not be a violation of this Agreement and it shall not be cause of discharge or disciplinary action in the event an employee refuses to cross the primary picket line.

In the summer of 1993, some unit employees met to discuss their dissatisfaction with their treatment by the Respondent and their representation by the Union. In time, the employees formed a committee, with Charging Party Albert Crockett, a garbage truckdriver, as its president. The committee decided to picket the Respondent's corporate headquarters on December 23, 1993, to demonstrate publicly their dissatisfaction.[3] Having learned of the planned picketing, the Respondent's vice president, Ritchie Isola, initiated a meeting with the committee on December 22, 1993. Isola listened to the employees' grievances and advised the employees to resolve their problems through the Union. The picketing took place without incident on December 23.

On January 1, 1994,[4] the Respondent terminated Crockett and the pitcher on his truck for salvaging during their run the previous day.[5] The two employees filed grievances concerning their termination, and the Union immediately met with the Respondent to press for the employees' reinstatement. On January 5, pursuant to the Respondent's instructions, Crockett arrived at the Respondent's facility, a waste transfer station, to drop off his overalls and pick up his last paycheck (January 5 was a regular payday for the Respondent's unit employees). Crockett arrived shortly after 12:15 p.m., and began speaking to employees about his termination. A crowd of employees gathered around Crockett on company property near the entrance to the facility, and began to discuss the circumstances of Crockett's termination and his then-pending grievance.

After noticing that employees were congregating around Crockett rather than entering the facility, Supervisor Elmo Walker told employees about 12:30 p.m., one-half hour before their paid workday began, that they

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Contrary to the judge, we find that a narrow cease-and-desist Order is appropriate because the Respondent has not been shown to have a proclivity to violate the Act or a general disregard for employees' fundamental statutory rights. See *Hickmott Foods*, 242 NLRB 1357 (1979). Accordingly, we shall modify the recommended Order and substitute a new notice.

We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996); and *Excel Container, Inc.*, 325 NLRB 17 (1997).

[3] When informed of the employees' plans, the Union sent a letter to the Respondent, dated December 20, 1993, advising that the Union did not support or condone, and was not involved with "the demonstration scheduled for December 23, 1993." The Respondent's corporate headquarters is located some distance from the transfer station where the employees worked, and no employees were dispatched from the headquarters site to collect garbage.

[4] All dates are in 1994 unless otherwise noted.

[5] A pitcher is assigned to a garbage truck to load the garbage into the truck. The Respondent's rules specifically prohibit "salvaging," i.e., the retention by an employee of an item placed out for removal as garbage.

did not know what they were doing, that they needed to come in and go to work, and that they were not doing the right thing.[6] Subsequently, Supervisor Oliver Williams made several similar appeals to the employees between 12:30 and 12:45 p.m. With only a few exceptions, the employees disregarded these pleas. At 12:45 p.m., the buzzer sounded with the majority of the shift still outside.

A few moments later, Williams announced to the men waiting outside that the police had been called, and that they had to either come to work or get off the Respondent's property. At approximately 12:58 p.m., the police arrived and directed the employees to either go to work or leave the Respondent's property.

The employees left the Respondent's property and milled about in a vacant lot across the street. At about 1:15 p.m., the Respondent's supervisor, Hilton, spoke to the employees at the vacant lot; Hilton again appealed to them to report for work. Although the employees immediately attempted to comply, they were turned away by the Respondent's security men and later told that they were terminated.[7]

The judge found, inter alia, that the employees' actions amounted to an unprotected work stoppage in light of the contractual no-strike clause.[8] In this regard, the judge found that the employees had refused to commence work for the first 35–40 minutes of their shift, and that at least one purpose of their conduct was to pressure the Respondent to be more generous in its handling of Crockett's grievance. The judge found that the employees' conduct fell within the statutory definition of a strike, citing, inter alia, *Empire Steel Mfg. Co*., 234 NLRB 530 (1978), and was unprotected under the contractual no-strike clause. The judge found, however, that the employee activity had been condoned when the Respondent solicited the employees to return to work.

We agree with the judge that the employees' conduct constituted a strike, but, for the reasons that follow, we find that the Respondent has not established that the work stoppage violated the no-strike clause. We, accordingly, conclude that the employees did not lose the protection of the Act, and, thus, need not reach the judge's finding of condonation.

Consistent with the complaint allegations, the evidence presented in this case establishes that the Respondent discharged the 71 alleged discriminatees because they engaged in a work stoppage on January 5, and that a purpose of the work stoppage was to protest the Respondent's termination of employee Crockett.[9] In general, the right of employees to engage in concerted activities of this type is protected by Sections 7 and 13 of the Act.[10] In light of this showing, the burden shifted to the Respondent to demonstrate that the work stoppage was unprotected, in this case to show that the work stoppage violated the contractual no-strike clause. See *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 277 (1956) (whether a work stoppage is unprotected because it violates a no-strike clause is an affirmative defense); *Heavy Lift Services*, 234 NLRB 1078, 1079 (1978) ("the initial burden of proceeding with proof of an affirmative defense rests with Respondent), enfd. 607 F.2d 1121 (5th Cir. 1979). For the reasons that follow, we find that the Respondent has not met its burden.[11]

The Supreme Court has consistently refused to "infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'" and has held instead that "the waiver must be clear and unmistakable."[12] The Board has recapitulated the pertinent law in these terms:

> Section 7 of the National Labor Relations Act gives employees the right to engage in concerted activities for the purpose of collective bargaining or for other mutual aid or protection. Unions, in their representational capacity, may bargain away certain Section 7

[6] Under the Respondent's long-standing practice, afternoon shift employees were required to enter the Respondent's building by 12:45 p.m., when a buzzer sounded and the entrance door was locked. Employees attempting to enter after 12:45 p.m. were turned away, sent home without pay for the day, and subjected to progressive discipline for failing to report to work. Once employees entered the facility, they would clock in and receive their truck and route assignment. According to Foreman Oliver Williams, it took 30–45 minutes to assign an entire shift. The Respondent, however, only began paying employees at 1 p.m. despite requiring that they spend 15 minutes beforehand locked inside its premises. Employees would leave after 1 p.m. to pick up the trash on their routes, returning to the transfer site as necessary to empty their trucks.

[7] The judge specifically found that the decision to terminate the employees was made after they had been turned away.

[8] The judge found no merit to the Respondent's contention that the January 5 work stoppage was unprotected under *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975). We adopt this finding for the reasons stated by the judge.

[9] The complaint alleged that the Respondent discharged the discriminatees on or about January 5 because of their union and/or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[10] Sec. 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Sec. 13 of the Act provides:

> Nothing in this the Act [subchapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.

[11] Contrary to the implication of our dissenting colleague, the burden was not on the General Counsel to disprove the applicability of the contract's no-strike clause.

[12] *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983) (citing *Mastro Plastics Corp.*, supra at 283).

> rights such as the right to engage in strikes during the contract term . . . and the right to sanction or encourage strikes. . . . Such waivers of employee rights must, however, be explicitly stated, clear and unmistakable.

Lear Siegler, Inc., 293 NLRB 446, 447 (1989) (citations omitted).

The "clear and unmistakable" standard for finding waiver of a statutory right, however, does not "[require] more elaborate evidentiary support than simply placing an objective construction on a contract." *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1031 (D.C. Cir. 1986), supplemental decision 291 NLRB 1039 (1988), enfd. 898 F.2d 524 (7th Cir. 1990), relying on *NLRB v. Rockaway News Supply Co*., 345 U.S. 71, 79 (1953) (interpretation of no-strike clause involves "no determination of rights or duties respecting picket lines broader than this contract itself prescribes"). In interpreting contractual language, words must be given their "ordinary and reasonable meaning," *Pacemaker Yacht Co. v. NLRB*, 663 F.2d 455, 459 (3d Cir. 1981), and enforced "[a]bsent a contractual provision in irreconcilable conflict with federal labor policy [since] neither courts nor the Board may modify or nullify substantive contractual provisions." Id. at 460. In short, the parties' actual intent governs, "whether that intent is established by the language of the clause itself, by inferences drawn from the contract as a whole, or by extrinsic evidence." *Electrical Workers IBEW Local 1395*, supra at 1036; accord: *Indianapolis Power Co*., supra at 1041 (supplemental decision).

The question presented here is whether the Union, by the contractual no-strike clause, waived the Section 7 right of the Respondent's employees to engage in the January 5 work stoppage, in support of Crockett's grievance.

The language of the clause does not purport to prohibit employees from engaging in unauthorized or "wildcat" work stoppages; rather, the clause merely forbids the Union from "call[ing], encourag[ing], or condon[ing] strikes, and it carves out of that prohibition the right of individual employees to honor primary picket lines elsewhere if sanctioned by the Union. Given this careful drafting, it is reasonable to expect that if the parties intended to reach concerted employee activities which were not sanctioned by the "Union," they would have inserted explicit language.[13] Compare *Metropolitan Edison Co*., supra at 695 ("The Brotherhood and its members agree that during the term of this agreement there shall be no strikes or walkouts by the Brotherhood or its members . . . it being the desire of both parties to provide uninterrupted and continuous service to the public."); *Pacemaker Yacht Co*., supra at 458 ("[t]he Union agrees that there will be no strikes, picketing, slowdowns, deliberate curtailment of production, work stoppages of any kind or other interruption of the Company's operations. In the event one or more employees fail to abide by the provisions of this Article, the Company retains full right to take any disciplinary action it deems necessary, including discharge"); *Food Fair Stores v. NLRB*, 491 F.2d 388 (3d Cir. 1974) (after the first 24 hours of any unauthorized work stoppage, "the Employer shall have the sole and complete right to immediately discharge any Union member participating in any unauthorized strike, slowdown, walk out, or any cessation of work").

The Respondent has adduced no extrinsic evidence to show that the parties intended the clause to be read more broadly. To the contrary, the only record evidence concerning the parties' application of the clause is the picketing incident in December 1993 discussed above. There, following the Unions disavowal of any role in the employees picketing, the Respondent took no action against the employees who engaged in the picketing. While not determinative, the parties conduct in December 1993 is consistent with interpreting the clause to apply only to picketing or work stoppages that are authorized, encouraged, or condoned by the Union. And there is no evidence or contention in this case that the Union played any role whatsoever in the events of January 5. To the contrary, there is abundant evidence that the employee's actions were a spontaneous response to Crockett's discharge, and were at least as much of a surprise to the Union as they were to the Respondent.

Furthermore, unlike our dissenting colleague, we find that the no-strike clause's applicability to work stoppages not sanctioned by the Union was litigated in fact. At the beginning of the hearing the Respondent's counsel stated his understanding of the issues in this case: "I think this is a very clear-cut case, it's a win or lose on whether the activities were protected, and whether the contract was or was not violated. The collective-bargaining agreement was introduced into evidence at the hearing, and the Respondent, in its brief, to the judge contended that the no-strike clause should be read broadly to proscribe individual employee conduct because it expressly permits employees to observe sanctioned picket lines at other em-

[13] 3 Corbin *On Contracts* § 552 (1960) (where a specific example is listed "it may reasonably be inferred that the subjects not specifically named were intended to be excluded").

We find no merit to the Respondents contention that the provision, quoted above, which *limits* the applicability of the no-strike clause to union-sanctioned sympathy strikes, establishes that the no-strike clause should be read more *broadly* than its plain language indicates to encompass work stoppages *not* sanctioned by the Union. In addition, if the no-strike clause applied to the unauthorized January 5 work stoppage, then the Respondents termination of the employees involved would appear to be cognizable under the contractual grievance-arbitration clause. The Respondent, however, has taken the position that the terminations are not arbitrable. The inconsistent positions taken by the Respondent undercut its contention that the no-strike clause should be read to encompass the January 5 unauthorized work stoppage.

ployers.[14] As noted above, the judge found that the January 5 work stoppage was prohibited by the contractual no-strike clause. The General Counsel excepted to this overall finding, in addition to his exceptions to the judge's subsidiary finding that the employees had engaged in a work stoppage. Under these circumstances, we find that the applicability of the no-strike clause to unauthorized strikes is properly before us and our consideration of this issue is neither unfair to the Respondent nor a denial of due process.[15]

Our colleague additionally asserts that the work stoppage may be unprotected because it concerned a matter—Crockett's termination—that was covered by the contracts grievance-arbitration clause, citing *Teamsters Local 174 v. Lucas Flour Co*., 369 U.S. 95 (1962). In *Lucas Flour*, a Section 301 case, the Supreme Court held that a unions contractual commitment to submit disputes to binding grievance arbitration gives rise to an implied obligation on the part of the union not to call a strike over such disputes. In *Lucas Flour*, the union called a strike to force the employer to rehire a terminated employee, instead of submitting the termination grievance to binding arbitration under the procedure established by the parties collective-bargaining agreement. Because "[t]he grievance over which the union struck was, as it concedes, one which it had expressly agreed to settle by submission to final and binding arbitration proceedings," the Court held that "[t]he strike which it called was a violation of that contractual obligation."[16]

The implied no-strike obligation recognized in *Lucas Flour* is inapplicable where, as here, the parties have agreed on an express no-strike clause. Absent any expression of intent by the parties in the agreement, the *Lucas* Court inferred a no-strike agreement coextensive with the arbitration clause, so that the union could not strike, nor the employer lock out with respect to issues which they had agreed to resolve by arbitration. However, where the parties have negotiated an explicit no-strike clause, it is improper to infer a different one. The issue is the intention of the parties, and where the parties have explicitly addressed an issue it is generally improper to impose on the parties a contrary intent, whether broader or more limited.[17] Thus, the issue here is not an inferred no-strike obligation, but the scope of the no-strike clause to which the parties agreed. And because the parties have explicitly negotiated separate arbitration and no-strike clauses, the wording of each clause must be examined separately. *Electrical Workers IBEW Local 1395 v. NLRB (Indianapolis Power)*, supra at 1034.[18] In sum, the language of the express no-strike clause "is plainly the only proper guide for determining whether the employer and the union intended to forbid" the unauthorized January 5 work stoppage, and "[t]he arbitration clause of the contract is not relevant." *Operating Engineers Local 18 (Davis-McKee, Inc.)*, 238 NLRB 652, 659 fn. 41 (1978) (Member Penello concurring).[19]

In view of the foregoing, we find that the Respondent has not sustained its burden of showing that the Union "clearly and unmistakably" waived the employee's right to engage in concerted activities of the character of the events of January 5. Accordingly, we further find that the employees brief and spontaneous, concerted work stoppage was protected by Section 7 of the Act, and we conclude that the Respondent's discharge of the employees who engaged in the work stoppage violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Silver State Disposal Service, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted and union activities in support of employee grievances.

(b) Discharging employees because they engage in protected concerted and union activities as unfair labor practice strikers.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[14] Since the Respondent made this argument in its brief to the judge, it is obvious—contrary to our dissenting colleagues contention—that the Respondent was aware that it needed to show more than just that a work stoppage had occurred in order to establish its contractual defense.

[15] See *Jones Dairy Farm*, 295 NLRB 113 (1989), enfd. 909 F.2d 1021, 1028–1029 (7th Cir. 1990) (no denial of due process where Board decided case on basis of an interpretation of no-strike clause not advanced at hearing).

[16] *Lucas Flour Co*., supra at 106. In this regard, we note that, while the parties collective-bargaining agreement allows individual employees to file grievances, the agreement also authorizes the Union and the Respondent to resolve any grievance by mutual consent and further provides that "such adjudication . . . shall be final and binding upon the parties. Thus, it does not appear that an individual employee could obtain arbitration of any dispute without the support of at least one of the parties."

[17] 3 Corbin, *On Contracts* § 64 (1960) ("where the parties have made an express contract, the court should not find a different one by 'implication'").

[18] While "an arbitration agreement is usually linked with a concurrent no-strike obligation . . . the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties." *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 382 (1974); accord: *NLRB v. Rockaway News Supply Co*., supra at 79.

[19] The Board adopted Member Penello's *Davis-McKee* concurrence as "a sound and straightforward guide to construing no-strike provisions in *Indianapolis Power Co.*, 273 NLRB 1715 (1985), remanded on other grounds sub nom. *Electrical Workers IBEW Local 1395 v. NLRB*, supra. The now-abandoned majority position in *Davis-McKee* has been characterized as "something of a sport among the corpus of the law of collective bargaining agreements viewed as a whole." *Electrical Workers IBEW Local 1395*, supra at 1035.

(a) Within 14 days from the date of this Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judges decision:

Michael Adams	Caesar Adamson
Max Allen	Willie Allen
Romeo Andaya	Tony Andrews
Willie Bell Jr.	Cary Besse
Robert Bradley III	Michael Broughton
Thaddeus Brown	Thomas Campbell
Wally Carter	Howard Clemons
Bernal Cortez	Albert Crockett
Avant Danjou	Renoid Davis
Roscoe Davis	Sanford Davis
Theodus Davis	John Dickson
Frank Dix	George Doyle
Austin Fox	Anthony Gantt
Anthony Gray	Virgil Green
Gary Hall	Ronald Sanders
Kevin Hamler	Mark Anthony Harris
Clyde Harris	Kirby Hayes
Darrell Herrin	Lamzo Hymea
Spencer Hymen	Marvin Jackson
Reginald Johnson	Samuel Jefferson
Otis Leggett	Howard Lewis
James Long	James Lucas
Anthony Lucious	Gerald Marlowe
Randy Marshall	Jamie J. McCollum
Eric T. McMurray	Charles Meunerlyn
Samuel Moore	Earnest Phillips
Darrick Philson	Henry Plain Jr.
Michael J. Powell	Joe Louis Preston
James O. Pullum	Gerald A. Reed
Anthony Regan	Duane Ross
Curtis Schuler	Jerry Smith
David Utt	Joe Valdez
Lee Washington	Larry Williams
Charlie Smith	Joe Stafford
Howard Utt	Harold Walker
Chris Wheeler	

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 5, 1994.

CHAIRMAN GOULD, concurring.

I write separately to address issues left unaddressed by the administrative law judge, to state my agreement with his findings that the activities in question rose to the level of a strike, and to affirm his finding that the conduct at issue "was designed in part to put pressure on Respondent to be more generous in its handling of the Crockett grievance than it might otherwise have done, if it did not know of the employees willingness to refrain from commencing work as scheduled in solidarity with Crockett and his grievance." I would affirm his reliance on his two criteria, i.e., "sufficient duration and coercive purpose" to approve his finding that "the employees action qualify as a strike."

I am of the view that an issue which the judge did not discuss is a prerequisite to consideration of either the no-strike or condonation matters. In *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), a decision alluded to by the judge in a different context, the Court held that consistent with the principles of both exclusivity and majority rule[1] employees, who sought to bargain with the employer independent of their certified representative and used picketing as a method to accomplish this objective, engaged in unprotected activity under the Act. While I had previously expressed disagreement with some of the conclusions at which the Court ultimately arrived in *Emporium*[2] it is

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

[2] W. Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 Yale L.J. 46 (1969). See also A. Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319 (1951);

important to note that the majority opinion expressed considerable concern at the prospect of fragmentation of the bargaining unit, and rejected the Court of Appeals conclusion that the impact upon the union and the principle of exclusivity were minimal because the union in that case "was not working at cross purposes with the dissidents."[3] Even the attempt to implement the right to be free from discrimination under Title VII of the Civil Rights Act of 1964, said the Court in *Emporium*, could not be "pursued at the expense of the orderly collective bargaining process contemplated by the NLRA." Id.

As the Court said in *Emporium*, the union "has a legitimate interest in presenting a united front on this as on other issues and in not seeing its strength dissipated and its statute denigrated by subgroups within the unit separately pursuing what they see as separate interests . . . in the face of such fragmentation . . . the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered." Id. at 70.

For a number of years prior to *Emporium*, I had been of the view that the Court of Appeals for the Fourth Circuit was correct in its interpretation of our Act in *NLRB v. Draper Corp.*[4] when it adopted the view that unauthorized stoppages undertaken once an exclusive bargaining representative has been selected by a majority of the employees inherently derogates the union and the exclusive bargaining representative concept since the employer is obliged to bargain with the union and not individual employees. See W. Gould, *The Status of Unauthorized and "Wildcat" Strikes under the National Labor Relations Act*, 52 Cornell L.Q. 672 (1967) (*Wildcat Strikes*). I am of the view that the errors in the Board thinking and its failure to take into account accurately the implications of *Draper* flow from decisions like the Boards in *Sunbeam Lighting Co.*[5] and the Fifth Circuits opinion in *NLRB v. R.C. Can Co.*[6]

These decisions proceed on the assumption that, if there is an identity or similarity of objectives between the union and individual employees, an unauthorized stoppage is protected under the Act because the majority representative and exclusive bargaining concepts cannot be usurped or derogated under such circumstances. This approach, which seems to constitute the overriding theme in determining whether the conduct is protected or unprotected under our statute, is both naive and misguided.

Because the Board and courts have examined this issue so as to determine whether the striking workers and the union have similar goals, if there is dissatisfaction with the bargaining process, sometimes this has been rationalized as frustration with the employer rather than the union.[7] This, of course, is not consistent with the real world and, in any event, highly unsatisfactory because the actual object of employee grievance, i.e., union or employer, may be a difficult inquiry to answer inasmuch as the workers may be dissatisfied with both parties in some or most instances. Moreover, the major deficiency of this approach and the *R..C. Can* doctrine itself is its focus upon the *substantive* goals being determined by the union and the striking employees to see whether those goals are identical.

Again, if they are identical, the action will be protected. Representative of this approach is Judge Posner's comment in *East Chicago Rehabilitation Center v. NLRB*,[8] when he said:

> By demonstrating to the union the passions that had been aroused by the new lunch rule, the strike led the union to demand that the employer rescind the rule, and in effect he did . . . and there is no evidence that in demanding rescission the union was merely yielding to pressure from a vocal minority and giving up alternative demands more important to the bargaining unit as a whole. [Id. at 401.]

But the fact of the matter is that, generally speaking, union and employee goals, at least as they are known to the public, both before and during negotiations and indeed right through the 11th hour, are going to be nearly identical if not synonymous. Both the employees and the union generally want to improve the living standards and protect the job security of the employees. This is as it should be.[9]

Even when dissatisfaction and disagreements actually emerge, generally that can be only observed by a tribunal like ours or a reviewing court when the bargaining process is at or near completion and, even at that stage, only with great difficulty. The same holds true of the attempts by the Board and the courts to determine whether the employee initiative is a demand for separate bargaining or not. Compare, for instance, *NLRB v. Bridgeport Ambulance Service*, 966 F.2d 725 (2d Cir. 1992), with *NLRB v. Owners Maintenance Corp*., 581 F.2d 444 (2d

N. Cantor, *Dissident Worker Action, After The Emporium*, 29 Rutgers L. Rev. 35 (1976); and C. Craver, *Minority Action versus Union Exclusivity: The Need to Harmonize NLRA and Title VII Policies*, 26 Hastings L.J. 1 (1975).

[3] *Emporium Capwell*, supra at 69.

[4] 145 F.2d 199 (4th Cir. 1944). While the Fourth Circuit did not appear to rely on the fact that only a minority, i.e., 25 percent of the unit employees participated in the walkout, it nonetheless alluded to this factor. I would not consider the amount of employee support in resolving the protected status issue. W. Gould, *Wildcat Strikes*, supra at 698–700. Cf. *Simmons Inc. v. NLRB*, 315 F.2d 143, 147 (1st Cir. 1963); *Western Contracting Corp. v. NLRB*, 322 F.2d 893 (10th Cir. 1963); and *Harnischfeger Corp. v. NLRB*, 207 F.2d 576 (7th Cir. 1953).

[5] 136 NLRB 1248 (1962), enf. denied 318 F.2d 661 (7th Cir. 1963). Accordingly, to the extent that the Boards decisions in *Sunbeam* and *R.C. Can* and subsequent decisions that rely on the same theory are inconsistent with this opinion, I would overrule them.

[6] 328 F.2d 974 (5th Cir. 1964).

[7] W. Gould, *Wildcat Strikes*, supra at 684–685.

[8] 710 F.2d 397 (7th Cir. 1983) (enfd).

[9] *Novotel New York*, 322 NLRB No. 121 (1996) (not reported in Board volumes).

Cir. 1978). See also, for instance, *East Chicago Rehabilitation Center v. NLRB*, supra; *NLRB v. A. Lasaponara & Sons, Inc.*, 541 F.2d 992 (2d Cir. 1976).[10]

I am of the view that the Board should discard the thesis that disagreement or agreement about the substantive goals of the strike is relevant to the protected status of the workers conduct. The key consideration in determining whether the worker's conduct undermines or derogates the exclusive bargaining representative concept is whether there is some consistency or accord between the union and the strikers on the question of strategy and timing. It may be that a limited no-strike clause such as that contained in the instant case which allows the employees and not the union to call the stoppage is of some relevance and supportive of protected status in that it may reflect prior union endorsement or authorization of spontaneous stoppages[11]—though my sense is that more evidence is required.

Some evidence of union support, endorsement, or authorization of the strikers' strategy is appropriate though neither the National Labor Relations Act or the Labor Management Reporting and Disclosure Act of 1959 mandate a strike vote or any internal union vote on strikes or ratification.[12] The employer, which may be subjected to competing pressures from different employees, ought to have some form of notification if the walkout is to be regarded by the Board as protected. Thus, union support should be manifested through notification of the employer through collective bargaining or some other forum.

Second, a vote to strike prior to the strike itself conducted through internal union procedures would be relevant to the question of endorsement. For here the procedure would endorse or be relevant to the timing of the strike.[13] I have expressed some concern about the impact of employer inquiries about internal union procedures.[14] But the vote or expression of support through some union mechanism—a vote or support which was transmitted to the employer—would be indicative of consensus on the critical issue of timing and strategy and should therefore weigh in favor of protected status.

Again, it is consensus about strategy that the Board should look to, not identity of substantive goals as it has in the past. I have written previously about the importance of timing and the use of economic weaponry as has the Supreme Court in the context of its discussion of the right to lock out.[15] If, for instance, a union wants to delay use of the strike weapon to a time that it deems to be more propitious, it is hard to imagine something that is more inconsistent with the exclusivity concept than a strike at another time. Yet, under the Board's present approach, so long as identity of substantive goals is found to exist, the activity is protected. This approach creates havoc with union policy, good industrial relations, and the sound administration of our Act which is designed to produce industrial peace and to promote the concepts of exclusivity and majority rule.[16] And it promotes the balkanization with which *Emporium* is at war.

I agree with the Administrative Law Judge that the strike here has been condoned and that therefore the employee conduct in question is protected. Thus, a remand to determine the facts relevant to the issues discussed in this opinion is unnecessary. Accordingly, I am of the view that the complaint should be sustained and I concur with my colleagues to support this result.

MEMBER HURTGEN, dissenting.

My colleagues do not quarrel with the judge's conclusion that the employees' conduct was a "work stoppage within the meaning of the relevant contractual clause. However, they have taken the position that the clause covered only conduct in which the Union is involved, and that it therefore did not cover the conduct of the employees involved here.

My difficulty with the position of my colleagues is that the aforementioned issue of contract coverage was not the litigated issue. Rather, the General Counsel's position was that the conduct of the employees did not amount to a "work stoppage." As a consequence, the Respondent was not called upon to present evidence or argument on the separate issue of whether the parties intended for their clause to cover allegedly "nonunion"

[10] If, of course, the separate bargaining issue is really a finding of fact but the Supreme Court treated it as a conclusion of law in *Emporium*, supra at 60–61.

[11] Cf. *Complete Auto Transit v. Reis*, 451 U.S. 401 (1981).

[12] In my view, the statute should be altered so that strike votes are mandated. See W. Gould, *Agenda for Reform: The Future of Employment Relationships and the Law* (MIT Press 1993) at 198–202. But this opinion is not predicated upon such an amendment or the need for its enactment.

[13] In *Draper*, supra, while the Fourth Circuit viewed the strike as unprotected, in fact the striking department had *voted* to strike.

[14] W. Gould, *Wildcat Strikes*, supra at 689. In the context of the duty to bargain, the Board has consistently held that a union's internal procedures and requirements for ratification are not the proper concern of the employer. Thus, an employer may not lawfully refuse to sign a contract on the basis that (1) the union's ratification procedures were not in accordance with the requirements of its bylaws and constitution, *Newtown Corp*., 280 NLRB 350, 351 (1986), enfd. 819 F.2d 677 (6th Cir. 1987); (2) the ratification vote was tainted by procedural defects, *Martin J. Barry Co*., 241 NLRB 1011 (1979); or (3) the union coerced its members into voting for ratification, *Utility Tree Service*, 218 NLRB 784 (1975), enfd. mem. 539 F.2d 718 (9th Cir. 1976).

[15] W. Gould *Wildcat Strikes*, supra at 687. See also my concurring opinion in *Telescope Casual Furniture*, 326 NLRB No. 60 (1998); which relies on *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965).

[16] The Board must repress its excessively protective approach to unauthorized stoppages, an approach which both encourages involvement in the unions internal affairs and, at the same time, makes union statesmanship more unlikely. A shift in Board decisions, which alters the latter consideration, may produce a difficult period of getting tough with unreasonable dissident elements. Whatever the result, a vehicle in support of membership revolts as well as union liability for the same conduct is not to be found in the Labor Management Relations Act. (W. Gould, *Wildcat Strikes*, supra at 704.)

mass employee action. Nor have the parties briefed to the Board the issue of whether the relevant clause has a "plain meaning," and whether extrinsic evidence should be considered. In these circumstances, I would not resolve these questions against the Respondent without giving it a full opportunity to be heard. I believe that considerations of fairness and due process preclude the result reached by my colleagues.

The majority argues that it was the Respondent's obligation to raise the aforementioned issue at trial. In this regard, my colleagues contend that the coverage of a no-strike clause is an affirmative defense. That may be true as a general proposition, but it ignores the manner in which the issues in this case were presented. At trial, the General Counsel himself adverted to the contract. He argued that the contract did not cover the conduct at issue here because the conduct was not a strike. The Respondent took the contrary position, and the issue was joined. The Respondent was not placed on notice as to the separate issue of whether the clause covered nonunion strikes. And that turns out to be the issue on which my colleagues have decided this case.[1]

Similarly, the judge found that the employees conduct was a strike, and was thus proscribed by the no-strike clause. The General Counsel's exceptions contend that the conduct was not a strike and thus the no-strike clause was inapplicable. However, the General Counsel's exceptions did not contend that the no-strike clause was rendered inapplicable by reason of the "nonunion" character of the strike. But, again, that is the basis on which my colleagues have decided this case.

My colleagues also argue that the Respondent did litigate the issue of whether the clause covers "nonunion" strikes. In this regard, they rely on the fact that the Respondent made an argument in its posthearing brief (to the judge) concerning the no-strike clause. However, this is no substitute for litigation at the hearing. That is the place at which General Counsel should state his position, so that the Respondent will have an opportunity to present evidence in rebuttal. Similarly, if the General Counsel wishes to place an issue before the Board, the exceptions are the vehicle for doing so.[2]

Further, even if the matter were properly litigated, and even if the "work stoppage clause were found to pertain only to union work stoppages, that would not end the matter. In this regard, I note that the contract also contained a grievance-arbitration clause which covered the dispute that led to the work stoppage. Indeed, a grievance concerning the matter was being processed at the time of the work stoppage, and it was the purpose of the work stoppage to influence treatment of that grievance. In these circumstances, there is at least an issue as to whether the grievance-arbitration provision of the contract required employees to await the outcome of grievance-arbitration, rather than engage in a work stoppage.[3]

My colleagues seek to distinguish *Lucas Flour* on the ground that the contract there did not contain an explicit no-strike clause. In their view, where the contract does contain such a clause, that clause is to be the only one that governs. I disagree. *Lucas Flour* held that a no-strike obligation could be inferred from an arbitration clause, even in the absence of an express no-strike clause. But the obverse does not necessarily follow. That is, it does not necessarily follow that a no-strike obligation can never be inferred from an arbitration clause if there is an express no-strike clause. It may well be, for example, that the parties wish to have one rule with respect to disputes in general, and another rule for disputes that are subject to the grievance-arbitration procedures. And, they may wish to be more restrictive with respect to strikes in the latter category. At bottom, as my colleagues concede, the issue is one of ferreting out the intention of the parties. And that is precisely my point. If the parties had focused their litigation on this issue, they could have elucidated the matter of intent. Instead, without such litigation, my colleagues have summarily resolved the issue.

Finally, my colleagues note that the Respondent takes the position that the terminations arising as a result of the strike are not arbitrable. Contrary to my colleagues, this is not inconsistent with the proposition that the discharge leading to the strike is arbitrable.

On a separate point, the judge found that the evidence established that the Respondent condoned the conduct of the employees. I disagree. In order to establish condonation, there must be "clear and convincing evidence that the employer has agreed to forgive the misconduct, 'to wipe the slate clean' and to resume or continue the employment relationship as though no misconduct had occurred."[4] The evidence here falls far short of that standard. Two low level supervisors told the employees to either come back to work or leave the property. There is no evidence that they expressed a willingness to forgive the conduct and to "wipe the slate clean."

[1] My colleagues note that Respondent asserted at trial that if it prevailed on the contractual issue, it would prevail in the case. The clear reference was to the contractual issue of whether the employees conduct was a "work stoppage." Little did Respondent realize that it could prevail on that issue and yet lose the case on a different contractual issue, viz., the one now raised and resolved by my colleagues.

[2] My colleagues rely on *Jones Dairy Farm*, 295 NLRB 113 (1989), enfd. 909 F.2d 1021, 1028–1029 (7th Cir. 1990). The case is clearly distinguishable. In that case, respondent itself raised the contractual language, and then complained that the ALJ and Board had misinterpreted that very language. By contrast, in the instant case, the General Counsel adverted to certain language in the contractual clause, and the Board now relies on other language in that clause to find a violation.

[3] See *Lucas Flour v. Teamsters Local 174,* 369 U.S. 95 (1962); *Suburban Transit v. NLRB*, 536 F.2d 1018.

[4] *White Oak Coal*, 295 NLRB 567, 570 (1989).

Rather, the supervisors were simply trying to persuade the employees to return to work. There is no suggestion that they were communicating a corporate decision to wipe the slate clean.

In addition, the evidence affirmatively indicates that Respondent did not intend to wipe the slate clean. In this regard, I note that when the employees sought to return, they were met with the Respondent's definitive response—they were turned away. Finally, the Respondent's position became even clearer when, later that day, it terminated the strikers.

In sum, the supervisors' mere invitation to return to work, unaccompanied by an indication of forgiveness, is far outweighed by the definitive and immediate actions by the Respondent. The judge apparently believed that an effort to persuade employees to return to work is necessarily an act of forgiveness. Such a principle would foreclose a company from taking the sensible step of seeking to achieve a return to work, and later (at a more dispassionate moment) reaching decisions about whom (if anyone) to discipline. The view of the judge is contrary to reasonable industrial practice. It would require an employer to finally decide all disciplinary issues in the heat of the moment, in a parking lot, while the strike is ongoing. I do not endorse such a requirement.

Accordingly, I would not find condonation.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in a work stoppage that is prohibited by the collective-bargaining agreement after we have condoned such conduct.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in an unfair labor practice strike in protest of our unfair labor practices.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL , within 14 days from the date of the Board's Order, offer the following employees immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss or earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest:

Michael Adams	Caesar Adamson
Max Allen	Willie Allen
Romeo Andaya	Tony Andrews
Willie Bell Jr.	Cary Besse
Robert Bradley III	Michael Broughton
Thaddeus Brown	Thomas Campbell
Wally Carter	Howard Clemons
Bernal Cortez	Albert Crockett
Avant Danjou	Renoid Davis
Roscoe Davis	Sanford Davis
Theodus Davis	John Dickson
Frank Dix	George Doyle
Austin Fox	Anthony Gantt
Anthony Gray	Virgil Green
Gary Hall	Ronald Sanders
Kevin Hamler	Mark Anthony Harris
Clyde Harris	Kirby Hayes
Darrell Herrin	Lamzo Hymea
Spencer Hymen	Marvin Jackson
Reginald Johnson	Samuel Jefferson
Otis Leggett	Howard Lewis
James Long	James Lucas
Anthony Lucious	Gerald Marlowe
Randy Marshall	Jamie J. McCollum
Eric T. McMurray	Charles Meunerlyn
Samuel Moore	Earnest Phillips
Darrick Philson	Henry Plain Jr.
Michael J. Powell	Joe Louis Preston
James O. Pullum	Gerald A. Reed
Anthony Regan	Duane Ross
Curtis Schuler	Jerry Smith
David Utt	Joe Valdez
Lee Washington	Larry Williams
Charlie Smith	Joe Stafford
Howard Utt	Harold Walker
Chris Wheeler	

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to these discharges and WE WILL notify each employee that this has been done and that we will not use the discharge against them in any way.

SILVER STATE DISPOSAL SERVICE, INC.

Richard C. Auslander, Esq., for the General Counsel.
Norman H. Kirshman, Esq. (Kirshman & Harris), of Las Vegas, Nevada, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this matter in trial in Las Vegas, Nevada, from March 14 through 29, 1995. The matter arose as follows. Howard Clemons, an individual, filed a charge with Region 28 of the National Labor Relations Board (the Board) docketed as Case 28–CA–12361 on January 11, 1994, against Silver State Disposal Service, Inc. (the Respondent). Caesar D. Adamson, an individual, filed a charge docketed as Case 28–CA–12365 on January 13, 1994, against the Respondent. Bernard Peter Williams, an individual, filed a charge docketed as Case 28–CA–12365–2 on the same day against the Respondent. Albert Crockett, an individual, filed a charge docketed as Case 28–CA–12595 on June 21, 1994, against the Respondent.

On July 1, 1994, following an investigation the Regional Director for Region 28 of the Board (the Regional Director) issued an order consolidating cases, consolidated complaint and notice of hearing respecting the former three cases. The Respondent filed an answer to the consolidated complaint dated July 26, 1994. On August 5, 1994, the Regional Director issued a complaint and notice of hearing in Case 28–CA–12595. On August 10, 1994, the Regional Director issued an order consolidating cases consolidating all the above-captioned cases. The Respondent filed an answer to the complaint in Case 28–CA–12595 dated August 15, 1994. The pleadings were further amended at the hearing.

The amended complaints allege and the amended answers admit that the Respondent terminated 68 of its employees on January 5, 1994. The complaints further allege and the answers admit that the Respondent terminated Bernard Williams, on January 6, 1994, and Albert Crockett on January 14, 1994. The complaints further allege that the Respondent terminated the employees because of the employees' protected concerted activity and in so doing violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act). The Respondent denies that the employees were engaged in protected activities on January 5, 1994, and rather contends that the employees, other than Williams and Crockett, were terminated because they struck in contravention of a no-strike clause in a current collective-bargaining agreement and because they were engaged in an unprotected attempt to deal directly with their employer in contravention of the exclusive bargaining status of their recognized agent for collective bargaining. The Respondent further contends Williams and Crockett were discharged for violation of company rules and not for improper or illegal reasons. The Respondent also contends that the allegations respecting Williams should be deferred to an arbitration decision rendered in a grievance brought by the Union respecting his discharge.

On the entire record,[1] including my observation of the witnesses and their demeanor, a physical inspection of the Respondent's premises, and helpful briefs from the General Counsel and the Respondent,[2] I make the following

FINDINGS OF FACT

I. JURISDICTION[3]

The Respondent is, and has been at all times material, a State of Nevada corporation which maintains an office and places of business in Las Vegas, Nevada, where it is engaged in the business of waste disposal. The Respondent annually enjoys gross revenues in excess of $500,000 and purchases and receives in interstate commerce at its Las Vegas, Nevada facility goods and materials valued in excess of $50,000 directly from points outside the State.

The complaint alleges, the answer admits, and I find that the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Teamsters, Chauffeurs, Warehousemen and Helpers, Local 631, affiliated with the International Brotherhood of Teamsters, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent at all relevant times has maintained offices and places of business in Clark County, Nevada, including its North Las Vegas Transfer Station (the facility), the location of the events in controversy, and its corporate offices located in Las Vegas. The Respondent is in the business of collecting, processing, and disposing of waste in Clark County, Nevada.

The Respondent has in essence been a family business. Alfred Isola, the Respondent's founder and principal, was corporate president and the director until his death on January 2, 1994. Joseph Anstett is a principal, corporate director and, prior to Alfred Isola's death, executive vice president succeeding to corporate president thereafter. Other principals and vice presidents at relevant times were Al Lippetti, Tom Isola, son of Alfred Isola, and Richard (Ritchie or Ritch) Isola, nephew of Alfred Isola. All of these officials worked at the Respondent's corporate offices in Las Vegas, Nevada, except Richard Isola and Al Lippetti. These latter individuals worked at the facility with Lippetti in charge of maintenance of equipment and Alfred Isola in charge of operations with final authority respecting facility personnel and labor relations matters.

At all times material, the Respondent has recognized and entered into a series of collective-bargaining agreements with the Union covering a bargaining unit of its employees, which in early 1994 numbered approximately 760. The great bulk of the unit was comprised of the Respondent's garbage truckdrivers

[1] The Respondent's unopposed motion to correct transcript of April 26, 1995, is granted as to all matters not discussed hereinafter. The Respondents motion to delete the record assertion of an administration of oaths to Crockett at pp. 709 and 1298 of the transcript: "after first having been duly sworn is granted as to the entry on p. 709 and denied as to p. 1298. The record at p. 709 of the transcript is further corrected to substitute the following for the deleted assertions noted above: "after first having been asked to raise his right hand and swear that the testimony he was about to give was the truth, the whole truth and nothing but the truth so help, him God. See further discussion of this matter, infra at sec. C,1,a,(1).

[2] The Respondent's May 4, 1995 errata to its brief was also received and considered.

[3] Where not otherwise noted, the findings here are based on the admitted portions of the amended complaints, the stipulations, or admissions of counsel and uncontested, credible testimonial or documentary evidence.

and pitchers,[4] all of whom are assigned to the facility. The relevant collective-bargaining agreement between the Respondent and the Union was in effect from June 1993 to June 1994 and contained, as article 12, no strike-no lockout, the following language:

> [T]he Union shall neither call, encourage nor condone any work stoppage, work slowdown, or picketing of the Employers several premises on its trucks; and the Employer will not lockout the employees covered by this agreement.

The Union's secretary-treasurer at all relevant times has been Bob McClone. The union president is Earl Saulter, who also serves as a business agent. Saulter, who prior to his service as a union official was an employee of the Respondent and a member of the bargaining unit at issue here, was the main union official involved in dealing with the Respondent and its unit employees until February 1994 at which time he was replaced by David Deitrich, a union business agent and the Union' representative in the instant matter.

The Respondent's facility garbage truckdrivers and pitchers (the employees) report to work, are assigned trucks and routes, depart from and return to the facility. At relevant times there were two shifts: the a.m. shift extending from 3 to 11 a.m. and the p.m. shift extending from 1 to 9 p.m. Employees were expected to report to work 15 minutes before their shift commenced and those employees who failed to timely enter the building were not allowed to work that day and certain aspects of a progressive discipline system were invoked.

B. Events

1. The activities of the committee

Beginning in the summer of 1993 certain of the Respondent's bargaining unit employees had occasion to meet at a local park on Sundays. Over time the number of employees meeting in this fashion grew and the feelings and opinions of the employees respecting their working conditions and their union representation were increasingly discussed. In time a committee of some half dozen employees was formed with Charging Party Crockett as its president. Ultimately committee members were formally elected by the employees attending a meeting.

Attendance at the meetings grew over time from perhaps 15 employees to 100 or more and the location was moved from the public park to the union hall.[5] A wide range of employee concerns were discussed. Grievances and concerns respecting the Respondent's conduct toward employees were aired. Unhappiness with the Union's representation of unit employees was discussed. Ideas for improvement of the current contract and proposals for the then upcoming negotiations for a new contract were solicited and recorded.

Earl Saulter, the Union's president and business agent who was during this period the union official primarily involved with the bargaining unit, was aware of the meetings—indeed it was he who regularly furnished the employees with the key to the union hall—and was at least on some occasions invited to attend, but did not.

By late fall 1993, the expressions of employee unhappiness with current circumstances coalesced in the idea of picketing in order to demonstrate employee dissatisfaction with the status quo. This action was discussed in the early and middle December 1993 meetings and the committee determined to picket the Respondent at its corporate offices in Las Vegas on December 23, 1993. The Union was made aware of the general plans of the committee and McClone, the Union's secretary-treasurer, attended the Sunday union hall meeting preceding the planned picketing at the invitation of the committee.

At the meeting preceding December 23, 1993, likely on Sunday, December 19, 1993, the gathered employees expressed to McClone their unhappiness with perceived inadequacies of Saulter's efforts on their behalf as well as their unhappiness and sense of grievance resulting from the Respondent's treatment of them. The planned informational picketing of the Respondent's corporate offices in Las Vegas by off-duty employees on December 23, 1993, was also announced. McClone told the gathering that he thought Union President Saulter was doing a satisfactory job in representing employees. He also told the group that the Union could not support their picketing. The group's decision to picket on December 23, 1993, was not changed.

The Union sent a letter to the Respondent dated Monday, December 20, 1993, over Secretary-Treasurer McClone's signature on union letterhead stating:

> Please be advised Teamsters #631 is in no way affiliated with the demonstration scheduled for Thursday, December 23, 1993. We do not support or condone these actions. Should you have any questions please advise.

Soon after its receipt, the union letter was read aloud by the Respondent's officials to bargaining unit employees.

2. The Respondent's meeting with committee members and the December 23, 1994 picketing

On learning of the intended picketing, the Respondent's vice president, Richard Isola, the corporate official in charge of the transfer station as well as the bargaining unit employees associated therewith, initiated a meeting with members of the committee which was held on the morning of December 22, 1993. The meeting was attended by six to eight committee members,[6] Ritchie Isola, and management colleagues and extended over perhaps 2 hours.

Various committee members expressed complaints concerning their perceptions that the Respondent's supervisory staff was arrogant and arbitrary respecting unit employees, that promotional opportunities for the primarily black bargaining unit into the primarily white managerial hierarchy were not sufficient, and that the Union and its agents were insufficiently vigorous in championing the employees cause to management.

Richard Isola listened to the committee's complaints and essentially expressed the view that the employees' problems were largely with the Union. He advised the employees to, in effect, use the strength of their numbers to influence the Union to their point of view emphasizing the substantial size of the bargaining unit as a proportion of the Union's membership.

The intended picketing was discussed with committee members expressing the view that it was necessary to get the Union's and the public's attention to better address their grievances. Isola warned the committee members that they should

[4] A pitcher works in association with a garbage truckdriver and assists in loading materials onto the truck.

[5] The meetings at the hall were not official union meetings, but took place with the knowledge and permission of the Union.

[6] Committee President and Charging Party Albert Crockett was unable to attend.

avoid getting "caught in a cross fire," that their jobs provided good pay and benefits and should not be risked lightly. Soon thereafter the meeting ended. The committee members concluded that the meeting had insufficiently addressed their problems and that the picketing should go forward as planned.

On December 23, 1994, approximately 40 off-duty unit employees, including the committee members, picketed the Respondent's corporate offices for several hours with signs bearing the legends, inter alia: "No Code of Ethics," "Unfair Labor Practices," "No Union Support," and "We Are Human Beings Not Animals."

3. The initial termination of Charging Party Albert Crockett and events to January 5, 1995

Albert Crockett worked as a driver on Friday, December 31, 1993, with Duane Guerth[7] as his pitcher. Sometime that day Guerth salvaged a radio which he placed inside the garbage truck. The men ended their shift that day without incident. That evening the radio was found in the truck by a member of management. The following day, Saturday, January 1, 1994, Guerth was terminated for salvaging[8] and Crockett was terminated for being aware of and failing to file a report concerning Guerth's salvaging.

The following day, Sunday, January 2, 1994, Crockett and Guerth went to the union hall with Union Steward Ron Gibson. They met with Union Agent Saulter, reported the circumstances surrounding their discharges, and expressed a desire to file a grievance. Saulter instructed the two to meet with him at the facility the following day. The next day, Monday, January 3, 1994, the four met with the Respondent's operations manager, Paul LaBruzzo, who refused to reinstate the two men asserting that the Respondent was sticking to the discharges. After the meeting ended, Saulter told the two that he would get back to them respecting the matter. Saulter continued to press the grievance with the Respondent with no success. He met with Guerth and Crockett again on Tuesday, January 4 and told them he had spoken to Rich Isola, but that he had declined to reinstate the two men. Saulter told the two however that another meeting was to be set up with the Respondent on the grievance.

Parallel to the events discussed above, at the turn of the year Corporate President and Principal Alfred Isola was taken unexpectedly ill and died on January 2, 1995. His funeral was held on January 5, 1995, in Las Vegas. Ritchie Isola who was out of town for the holidays, returned, and with his family members dealt with the unhappy circumstances presented by the death of Alfred Isola. During the course of these events, he apparently had tangential dealings with the Crockett grievance after the discharged had been consummated, but was essentially dedicated to family and transitional matters.

[7] Guerth's name was spelled variously both in the transcript and in the briefs.

[8] The Respondent maintained and enforced a longstanding rule against retention or salvaging of items by drivers or pitchers. Neither the rule nor its application is under challenge by the General Counsel.

4. Wednesday, January 5, 1995[9]

a. The events in and around the entry door

The funeral and related gatherings honoring deceased President Alfred Isola on Wednesday, January 5, 1994, were attended by the Respondent's higher management. The Company continued its operations, however, and unit employees and line supervision prepared for work as normal. Coincidentally, that Wednesday was the regular payday for unit employees.

As usual, the p.m. shift was scheduled to commence at 1 p.m. The longstanding practice was to require the employees to be physically inside the building by the sounding of a warning buzzer at 12:45 p.m. Unit employees who were late were at risk of physical exclusion because the single entrance door into the unit employee staging area was regularly locked at 12:45 p.m. Employees who were excluded from the facility in these circumstances suffered both the loss of the day's work and wages as well as the accrual of a no-show discipline with eventual consequences under the progressive discipline system. Again consistent with regular practice and human variation, some employees arrived on site quite early, others somewhat early and others close to the last possible time sufficient to timely enter the building. Some employees entered the building immediately on arrival and awaited the commencement of the shift there, others tended to remain outside talking with fellow employees until the entrance deadline approached. Until the events in question discussed below and apart from the unhappy circumstances respecting Alfred Isola, January 5 was apparently a typical day at the facility from the perspective of unit employees.

Consistent with the instructions he received from the Respondent's agent, Haywood Carter, at the time of his discharge, Albert Crockett arrived at the facility on Wednesday January 5 sometime soon after 12:15 p.m. to drop off his company overalls and to pick up his final paycheck. Crockett did not enter the facility, but rather stayed outside the facility talking to employees and, after a few minutes, approached to within the general area of the unit employee doorway entrance and talked with other employees in the area.[10] The conversation dealt with

[9] The disputed events of January 5, 1994, occurring in and around the facility entrance door from on or soon after noon and subsequently involved a significant number of people. The specifics of the crowds conduct as well as what was said and done by various individuals in that context, both by employees and the Respondents agents, was testified to by numerous witnesses called by both the General Counsel and the Respondent. As to general events and timing, while testimony differed, I find that all the witnesses were attempting to honestly relate what they did, saw and heard and the times various events occurred. The fact that witnesses each experienced the rather complicated events from a personal perspective different from others in the crowd or inside the building, necessarily set their perspective of events somewhat apart. So, too, human variation in perception, recollection, and reporting of events in my view added to the variation of the witnesses testimony concerning various circumstances. Where it is not necessary to resolve noncritical aspects of the testimony concerning events, those events have been described generally relying on an amalgam of the witness testimony as well as the probabilities applicable to such events.

[10] Crockett testified that the procedure for a unit employee who wanted to pick up his paycheck on a payday when the employee was not scheduled to work required the employee to wait until the unit employees had commenced work and the trucks had been assigned before picking up the paycheck.

Crockett's discharge and grievance and matters relating to those two circumstances.

From a small gathering of one or two unit employees talking with Crockett, in time a large group gathered with Crockett explaining and answering questions respecting his discharge, grievance, and the larger context of events. He testified however, and no witness contradicted him, that he did not refer to the events of December 23, 1994, in talking with his fellow employees. There is no question that Crockett's termination and his description of the progress made on his grievance concerned many employees and, among at least those employees, indignation grew. As the group grew, the crowd itself also became a novelty and attracted attention in its own right. By about 12:30, or soon thereafter, a very large group of unit employees was gathered around Crockett with others somewhat further distant discussing the Crockett discharge and their fears and suspicions regarding it. So, too, yet other employees were only peripherally involved at best, were no more than curious about the crowd or remained in the area simply because others were there. During this period some unit employees entered the facility, some employees who were already inside the building, on learning of the gathering outside, exited the facility and joined the crowd. Generally however the employees remained outside and came to number about 100.

The Respondent's supervisory staff inside the building became aware of the unit employees gathered outside and their failure to enter the building and prepare for the commencement of the shift. The Respondent's long-time foreman, Oliver Williams, noticed Crockett standing outside near the employee entrance with this overalls over his arm. Overtime employees arrived and gathered around Crockett. Williams testified he was immediately concerned the men were going to walk off the job because of the existence of strike rumors and his conversation with Lucas the night before.[11] By 12:30 p.m. Oliver Williams and fellow foremen Jessie Williams and Elmo Walker noticed that the crown was growing larger about Crockett and few of the employees were entering the building. Oliver Williams, Elmo Walker, and security guard Bob Brice went outside through the employees entrance door and Elmo Walker told the men they did not know what they were doing, they needed to come in and go to work and that they were not doing the right thing.

Thereafter Oliver Williams went outside on several occasions, told the men what they were doing was wrong, and exhorted them to come into work. During this process the milling men generated their own noise and it was difficult to hear all that Williams said. On each occasion Williams was unsuccessful in persuading the employees to enter the building, Williams recalled that Crockett responded to his remarks on only one occasion: "I told [Crockett] that he was wrong when he—by holding the men up. He said, 'Im not holding them up.' He said, 'You guys go to work, at that time.'"

The events occurring at the time the buzzer sounded and thereafter were in dispute. Oliver Williams and security agent Robert Brice testified that Williams was outside attempting to get the employees to enter the building when the buzzer sounded at which time he turned and entered the building leaving the door unlocked. Employee Michael Broughton testified that he thereafter tried to open the door and found it was locked and, looking through the glass light in the door, saw a guard on the inside motioning him to cease his attempts to open the door. Employee Caesar Adamson testified that after the buzzer went off, Williams and others returned inside and thereafter an employee known only to him as Mike tried the door and said it was locked. Other employees testified they assumed the door was locked consistent with practice.

Employee Steven Ellerman testified he heard Oliver Williams tell the employees "You can come in to work, or you're off and start looking for another job." He further testified that after the buzzer went off, he entered the building through the door in contest without difficulty. Employee Ronald Leaks testified he heard Oliver Williams tell the employees: "If you want to work, you can come in now." Thereafter, he followed Williams into the building with fellow employee Willie Williamson right behind him. Employee Willie Williams testified that he heard Oliver Williams come out and tell the men: "I just got the word. Either come in now or your [sic] fired, and the police is on the way. You know, you can get your checks when the police come." At that point Williams followed Ronald Leaks into the building. Employee Calvin Clark testified he was inside the building and saw Oliver Williams, Willie Williams, and Ronald Leaks, and perhaps others enter the building through the door at issue without let or hindrance.

Oliver Williams testified that he had a radio call placed to Route Supervisor Jimmy Hilton who was offsite. He also had a call placed and finally reached Ritchie Isola by cellular phone. Williams testified:

> [Richie Isola] asked me what was going on and I told him that the men didn't want to go to work I said its a thing that Crockett had got fired. I said, "Crockett is on the property now." And his words, "Get the hell off of the property." And he said, "I'm headed out, Ill be there." And he sa[id], "Call the police."

Oliver Williams testified that Ritchie Isola also allowed him in the telephone call to speak to the men one more time. Richard Isola did not recall that aspect of the call.

In all events, the Respondent caused the North Las Vegas police department to be called and Williams again went outside where the crowd remained. What Williams said in this post-buzzer address of the employees was disputed. Oliver Williams testified he told the men:

> Gentlemen, come in close to where you can hear me. I just got off the phone with Isola. I asked him to give me the chance to come out and try to get you to come to work. I said, "You got a chance to come to work or he wants you off his property."

Williams testified that there was a lot of noise at the time he made this address. Others testified that there was confusion and difficulty hearing throughout the events occurring outside the facility that day. Numerous witnesses testified to Williams' address to employees. There seems little doubt that Williams told the men that the police were on their way and, in response to shouted questions about paychecks on that payday, said that the men would be paid offsite. The critical difference in what were essentially two versions of this event was whether Williams said the employees were to leave the Respondent's prop-

[11] Oliver Williams testified that he had a conversation with Howard Lucas after the end of the p.m. shift on January 4, 1994, in which Lucas voiced various complaints respecting working circumstances and indicated that the employees were going to get their problems "straightened out" by striking.

erty or, rather, told the employees they were to go to work or leave the property.

North Las Vegas Police officer Christopher Gandy testified, after refreshing his recollection with police time reports of the events of January 5, 1994, that he was contacted by radio respecting the events at the facility at 12:50 or 12:51 p.m. and arrived at the facility at 12:57 or 12:58 p.m. He testified that he and his fellow officers came on the employees gathered outside the building and, after talking to the Respondent's security staff, spoke to an unspecified number of employees, including Crockett, and asked the employees to go to work or leave the Respondent's property.

b. The events in the adjacent vacant lot

The employees either walked or drove their cars out of the facility parking lot and parked in and around a vacant corner lot adjacent to the facility where they gathered awaiting events. James Andrews testified that "not too long after the employees had moved to the vacant lot Route Supervisor Jimmy Hilton and Foreman Mid Jackson came to the lot. Andrews testified:

> Well, Jimmy [Hilton]—he said that "I know what you guys are doing, but you're going about it the wrong way. I need you to go back to work." . . . and then he turned to Reverend Crockett and said, "I need you to help me tell the guys, so Al stood up on a rock and told people that we should go back to work." At that point—actually, even before he stood up, I was telling the guys, "Lets go. Guys need to come on and go back in." And I was leaving. I got in my car and attempted to go inside the gate, and I met a co-worker who had already made it there—apparently about 30 seconds before me. He said, "They're not letting us in there—not letting us in." Then I proceeded to backup—put my car in reverse and park—actually, the wrong way. I should have been parked this way. I turned around.

Andrews further testified that soon after returning to the lot, after attempting unsuccessfully to go to work, he saw a limousine with Isola inside enter the facility after passing by the crowd of employees. Hilton entered the facility and returned some 20 to 30 minutes later. At that point Hilton told the men they had all been terminated. Andrews recalled that Hilton came to the lot a third time that day to summon certain employees to a meeting inside the facility.

Caesar Adamson essentially corroborated this version of events save that he also recalled Hilton told the employees on his second trip out that paychecks would be distributed outside the gate. Crockett also corroborated the other two men although he also recalled that Hilton in his initial remarks told the employees that he had heard of the problems over his radio. Crockett placed Hilton's arrival at from 10 to 15 minutes after the employees went to the lot. He also placed the arrival of Isola's limousine at just after the security guards had refused to let the employees onto the facility premises after Hilton had successfully solicited their return to work. Finally, he estimated that Hilton returned to the lot after his first visit in about 10 minutes or less. Eric McMurray described the events similarly save that he recalled that Hilton reported on coming out the second time that he had met with somebody in the facility and that all the employees were terminated.

Neither Hilton nor Mid Jackson testified.

Richard Isola testified that he returned to the facility in a limousine, which had been provided for funeral proceedings that day, and observed the employees in the area of the lot, the police on the premises, and the general confusion. Counsel for the Respondent characterized Isola's actions thereafter in his opening statement:

> [Richard Isola] went in and he talked to the foremen briefly, he got their reports, and included in the reports were concerns expressed by some of the foremen and the mechanics that—that there had been comments about damaging the equipment. And he made a decision at that point—he made a decision that he was not going to bring these people back and put them on 23,000-pound trucks that pick up trash at schools and hospitals and hotels, and that—that he felt that they were out of control, that he couldn't trust them, and he would have no ability to do anything once they exited the transfer station, so he made a decision right there and then—it might have been hasty, it might have been unfair, but it was a decision he made with certain objective evidence at hand.

c. The meeting at the facility

Soon thereafter the Union Secretary-treasurer Robert McClone, arrived with other union staff. A meeting was held, attended by Richard Isola, McClone, Crockett, James Lucas, and others. The meeting was videotaped and the videotape was introduced into evidence. The meeting addressed the merits of the discharge of Crockett and Isola's unhappiness that matters ripened during his uncle's funeral and required he leave the ceremonies. Isola reiterated that the employees, encouraged by Crockett and Lucas, had done the wrong thing and would not be allowed back. He asserted that the men had walked out. He asked McClone if he had told the men that if they walked out they were out of a job. McClone said he had.[12] Isola stated, "[T]hey made their decision." Crockett asserted, "They agreed to go to work and they couldn't get on the yard." Isola answered, "They agreed after 1 p.m. after the buzzer." No question, this is a right to work state. McClone indicated he would continue to process the Crockett grievance and would take and process grievances from the discharged employees. Settlement proved impossible and the meeting ended with Isola restating, "My head foreman said: 'If you walk off you are out of a job.' They walked off, they are out of a job. The ones that stayed, they went to work." McClone asserted that, "A lot of those people they dont realize the consequences. He sought the Respondent's reconsideration in a few days. Isola asserted, "They will never work here again and the meeting ended."

5. The Respondent's termination of employees

Over the period of January 5 and 6, 1994, at the behest of Richard Isola, the Respondent's staff perused videotape of the later events of January 5 as well as the Respondent's records of which employees were due to work on January 5 and talked with the Respondent's personnel—all with the purpose of determining who failed to report to work on the January 5 p.m. shift as a result of the events described above. A list was generated and individuals on the list were not allowed on the premises thereafter.

[12] The record does not suggest that McClone had any conversations with employees during the events or that any union official was aware of what was transpiring until the employees had been terminated. Presumably McClone was referring to the earlier disclaimers made by the Union respecting December 1993 events.

The Union and the terminated employees[13] were sent letters dated January 7, 1994, announcing that the named employee had "resigned his position by refusing to work and participating in a "mass walk out despite direct orders to begin work on January 5 in violation of the collective-bargaining agreement. The letters asserted further, "The wrongful conduct of the employee severs his employment relationship with this company. Some of the employees responded with letters contesting the Respondent's view of events.

The Union filed grievances respecting terminated employees and has attempted to take the grievances to arbitration. Respondent has refused.

6. Events respecting Bernard Williams

Bernard Williams had been employed by the Respondent since 1991. In the last third of 1993 he filed three grievances against the Respondent contending he had improperly been denied certain driving opportunities. He also participated in the picketing on December 23, 1993.

On January 5, 1994, Williams worked the morning shift finishing at about 11 a.m. Although he did not participate in the refusal to work on January 5, he was in the crowd at various times that day and into the early morning of the following day.

Bernard Williams testified he was scheduled to commence work at 3 a.m. on January 6, 1994. Williams determined he would not work that day because he wanted to "stand with the men. He went to bed and after arising later in the morning called the office about 10 a.m. to speak to his supervisor. When told his supervisor was not available, Williams left a message with an individual named Craig that he was not coming in that morning. He testified that he tried to visit the facility to talk to his supervisor later that morning, but was denied entry by security personnel.

The Respondent's human resources director, Musgrove, testified that he was involved in checking who had not reported to work on January 6 in light of the ongoing problems. He determined that Bernard Williams had not worked that day and that the Respondent's timekeeper at that time, Craig Laub, had reported that Williams had called in after 11 a.m. to report he was not coming in. He testified that the practice was to regard an after 11 call for the a.m. shift as a "no call no show." Determining that Williams had received his third no call no show in a 6-month period, Musgrove decided to terminate him without consultation with other officials. Bernard Williams was not scheduled to work on January 7 and received his termination notice as he reported for work on Saturday, January 8, 1994.

7. Subsequent events respecting Albert Crockett

Crockett, Guerth, union official Saulter, and the Respondent's agents met on January 6 to discuss the Crockett and Guerth discharge grievances. The Union took the position that Guerths actions were not known to Crockett and that, accordingly, Crockett was improperly discharged. The Respondent asked for time to consider this position. The meeting ended. The Respondent ultimately determined it would not prevail and on January 10, 1995, gave union official Saulter, who was at the facility, a letter agreeing to reinstate Crockett with full backpay and seniority.

Saulter went outside where the terminated employees and Crockett were and informed Crockett of the event and gave him a copy of the letter. Crockett asked Saulter to obtain for him a 30-day leave of absence because he did not want to back go work until the other discharged employees were reinstated.

Saulter had Crockett sign a written request for a 30-day leave of absence[14] and returned into the facility with it and the following day, January 11, 1994, submitted it to Richard Isola and another agent of the Respondent. Saulter testified he told the two that Crockett wanted the leave because he did not want to come back to work until the other discharged men were reinstated. The Respondent's agents told Saulter they would get back to him on the request. Later the same day the Respondent sent to the Union by facsimile transmission a letter denying Crockett's request for leave because the Respondent needed drivers and an insufficient number were available.[15] Saulter testified that he attempted to but was unable to initially reach Crockett with this information. He testified that he eventually reached Crockett on January 12, 1994, and told him that his request for a leave of absence had been denied by the Respondent. He also told Crockett he would file a grievance over the Respondent's denial of the leave.

Crockett and the discharged employees undertook various activities during the next few days to protest the discharges at least some of which took place on or outside the Respondent's premises. Crockett was outside the facility and the Respondent's agents knew he was there during this period. He did not however attempt to go to work nor otherwise communicate with the Respondent.

On January 14, 1994, Crockett was terminated for not calling in or showing up for 3 consecutive days. The Union filed a grievance respecting this discharge and has attempted to take the matter to arbitration. The Respondent has refused.

C. Analysis and Conclusions

1. Preliminary matters

a. Issues respecting the "Swearing In of Albert Crockett

(1) The Respondent's argument

The Respondent in its motion to correct transcript proposed, without discussion, to delete the transcripts assertions that Albert Crockett on the two occasions of his testimony was administered an oath. See footnote 1, supra, at page 1 of this decision.

[13] The parties, by stipulating to an amended consolidated complaint par. 5(a) and admitted answer admitting par. 5(a), agreed on a list of 71 names of employees who were both discharged as a result of the January 5 events and whose discharges the General Counsel alleges are violations of the Act. That agreed-on list of named employees is set forth in appendix I of this decision, infra.

[14] The contract asserts at art. 2, sec. 2., Leaves of Absence:

> Regular employees, upon written request to the Employer, shall be entitled to a maximum of thirty (30) days leave of absence without pay, without loss of seniority; provided, however, that the employee does not accept employment elsewhere during such leaves of absence.
>
> The Employer shall be permitted to refuse leave of absence if replacement of the employee is impossible, but the Employer shall first notify the Union as prescribed in Article 1 of the need for replacements before denying the leave of absence on this ground.

[15] There is no dispute that the Respondent had by this time put the Union on notice of the need for replacement employees and that the Union was not able to supply replacements.

The corrected transcript at page 709, with the deletion urged by the Respondent in its motion and my further correction, reads as follows:

> Whereupon,
>
> ALBERT CROCKETT
>
> was called as a witness herein and, after first having been asked to raise his right hand and swear that the testimony he was about to give was the truth, the whole truth and nothing but the truth, so help him God, was examined and testified as follows:
>
> THE WITNESS: No disrespect to the Court, your Honor, my testimony will be true, but I cant swear.
> JUDGE ANDERSON: Do you affirm?
>
> THE WITNESS: Excuse me?
> JUDGE ANDERSON: Do you affirm?
>
> THE WITNESS: Whats that?
> JUDGE ANDERSON: Please give us your full name and spell your last name, sir.
> THE WITNESS 1: Albert T. Crockett, C-R-O-C-K-E-T-T.
> JUDGE ANDERSON: General Counsel?

At this point the examination of the witness commenced without comment by any party on the above-quoted events until the receipt of the Respondent's motion to correct transcript and brief. On brief, at note 10 at page 14, the Respondent argues that the record, corrected by the granting of the Respondent's motion to correct, shows that:

> Albert Crockett declined to either take the oath or affirm that he would tell the truth. He gave no reason for his stance, and was simply permitted to offer what can only be characterized as testimony which has neither the solemnity of an oath nor affirmation. (See Sec. 102.30, Boards Rules and Regulations.)

The Respondent further argues that this asserted failure should cause his testimony to be disregarded or, at least, to render Crockett's testimony relevant only to the extent it contains admissions against interest. In the alternative the Respondent argues that these circumstances should be a factor to "be taken into account in "assessing credibility as to disputed issues." The General Counsel did not respond to the motion to correct transcript nor address the argument on brief quoted above.

(2) Applicable statutory and decisional provisions

The Boards Rules and Regulations, Section 102.30, provide in part: "Witnesses shall be examined orally under oath. Fed.R.Evid.603 states:

> Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

Cannon 36 of the Judicial Code of Ethics is similar.

The advisory committees note to Rule 603 of the Federal Rules of Evidence states:

> The rule is designed to afford the flexibility required in dealing with religious adults . . . . Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. Oath, includes affirmation, 1 U.S.C. Sec. 1; judges and clerks may administer oaths and affirmations, 28 U.S.C. Secs. 459, 953; and affirmations are acceptable in lieu of oaths under Rule 43(d) of the Federal Rules of Civil Procedure. Perjury by a witness is a crime, 18 U.S.C. Sec. 1621.

Dealing with the issue of religious beliefs as a factor in evaluating credibility, Fed.R.Evid. 610 asserts:

> Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature his credibility is impaired or enhanced.

(3) Events concerning the judges administration of the oath to Crockett

By the time Charging Party Crockett was first called as a witness on the 4th day of the trial, March 17, 1995, it was indisputably established that he was a religious leader and was referred to by unit employees and others in earlier testimony as "Reverend Crockett" and as a preacher.

On being called, Crockett came to the witness stand and I attempted to administer a traditional oath. Compare the language of the oath recited to Crockett with that contained in paragraph 17008: Oath in the Boards Administrative Law Judges Manual. Crockett's response is set forth above. In the corrected record I have inserted the fact that an oath was recited to Crockett[16] before his quoted comments.

Following the quoted portion of the transcript, the General Counsels examination of the witness commenced. No party raised any questions regarding the matter until the Respondent's motion to correct transcript and brief with the argument quoted above were received.[17]

Consistent with my practice respecting all witnesses in this trial who testified a second time following a substantial passage of time from their first testimony, I administered an oath to Crockett before he commenced his testimony on March 29, 1995, adjusting its language to meet his earlier objections.[18] Crockett adopted the oath without comment. Crockett was thereafter examined by counsel. No comment or objection of any kind was raised by any party.

(4) Analysis and conclusions respecting the administration and acceptance of the oath

(a) Was an oath properly administered to and taken by Crockett?

The statement Crockett made immediately preceding his initial testimony, as quoted in full supra, meets the requirements of the Boards Rules and Regulations Section 102.30 and Fed.R.Evid. 603. Based on all the events and circumstances discussed above, I find that on each occasion of his testifying in this proceeding Crockett solemnly promised to testify truthfully. Further, I assert that I came to that conclusion, as I had

[16] This transcript correction is in my view implicitly part of the Respondents motion. I did not take the Respondents motion and argument to be that no attempt was made to administer an oath, but rather that following a recitation of the language of the oath by the judge, Crockett's words did not rise to an acceptance of or a "taking" of the oath.

[17] The Respondent on brief argues that its "inadvertent failure to object cannot be deemed a waiver."

[18] The Respondent on brief argues that its "inadvertent failure to object cannot be deemed a waiver.

For this reason the Respondents motion to correct the transcript to delete the assertion that an oath had been administered to Crockett at transcript p. 1298 was denied.

with all witnesses in this case, before I permitted Crockett to be examined by counsel on each occasion of his testimony.

I further find, based on the above, the record as a whole and the demeanor of the witness during these events, that neither Crockett nor any other witness in these proceedings had his or her credibility enhanced or impaired as a result of the circumstances of the witness solemn promise to testify truthfully. I, therefore, reject the Respondent's arguments that Crockett's testimony should be in anyway diminished or adversely weighed as a result of these circumstances.

(b) The conduct of the judge

With the perspective of hindsight, I recognize that the portions of the Respondent's motion to correct transcript and argument on brief noted above devolved from my failure as the judge administering the oath to Crockett to insure, not only that the oath was administered in a form calculated to awaken the witness conscience and impress his mind with his duty to testify truthfully, but also to insure that there was no reasonable question or doubt in the minds of the parties that this was so.

Given the admonitions of Fed.R.Evid 610 that religious views are not relevant to issues of credibility and my knowledge at the time of the administrations of the oath that the witness was a religious adult, I perhaps subconsciously avoided emphasizing this aspect of Crockett's views by making any statement or engaging in subsequent record discussion with the parties respecting Crockett's assertion after my recitation of the words of the oath: "my testimony will be true, but I cant swear. When my brief attempt to substitute the word "affirm for the word "swear appeared unlikely to be immediately accepted by the witness, I concluded his assertion was sufficient and called on the General Counsel to commence his examination without any statement or explanation of my conclusion that Crockett's assertion was, in my view, sufficient under controlling rule and precedent. Simply put, I failed to make an affirmative statement on the record that I believed Crockett fully acknowledged his solemn obligation to tell the truth as a witness. Thus, I find my adjustment of the oath in the case of Crockett on the first occasion of his testifying—as discussed in the advisory note to Fed.R.Evid. 603, quoted supra, which permits a certain flexibility in the administration of the oath to religious individuals—was apparently insufficiently well communicated to the Respondent.

Assuming for purposes of the Respondent's argument in this context that a judicial failure to insure the parties fully understood the witness full compliance with the requirements of the oath occurred, such circumstances are regrettable. Further, the existence of possible judicial error always raises the question of harm or prejudice to one or another partys rights. Here the question is whether the possibility of judicial error in the communication of the circumstances of the administration of the oath to Crockett has prejudiced the Respondent in a way that needs be addressed in this proceeding. I have reviewed the record with this issue in mind. I do not find that the Respondent has been prejudiced in any way material to the resolution of the unfair labor practice allegations at issue here by the events in question.[19] Accordingly, I shall not further address the potential judicial error aspect of this issue.

[19] The Respondents counsel cross-examined Crockett respecting his testimony.

(c) The conduct of the witness and the effect on credibility of the events in issue

I reaffirm the belief, which I formed on each occasion of my administration of the oath to Crockett and which I specifically make as a finding of fact here, that Crockett recognized and objectively affirmed, on each occasion he was called as a witness and had the oath administered to him, that he was making "a solemn undertaking to tell the truth. I further find that there was no conduct by Crockett which was inconsistent with this finding. As noted, supra, if error occurred, it was judicial error in failing to insure that the Respondent understood what occurred during the administration of the oath. Crockett's conduct was entirely appropriate.

For these reasons, I reject the Respondent's argument on this record, that the administration of the oath to Crockett and Crockett's actions in undertaking to tell the truth in response thereto should in any way diminish his credibility as a witness or require that the use of his testimony be in some fashion circumscribed as a result thereof. Crockett along with all other witnesses at the trial took the oath and no witness at the trial, in my view on this record, had his credibility enhanced or impaired by the manner of oath taking as compared to other witnesses at this trial. My credibility resolutions in this matter have not been influenced by the form or manner in which any witness, Crockett included, obligated himself to tell the truth.

b. Issues respecting the disclosure of witness Dietrichs Board affidavit to the Respondent

David Deitrich testified on behalf of the General Counsel as to certain limited matters. On the conclusion of his testimony on direct, the Respondent requested the General Counsel turn over "any affidavit or writing signed or adopted by the witness. Counsel for the General stated he had such an affidavit but requested the judge "review it in cameraT1 to make the determination as to whether I should turn it over at this time or not. Counsel for the General Counsel took the position that there was nothing in the affidavit relevant for purposes of cross-examination of the witness testimony and that he should therefore not be obligated to turn over the affidavit to the Respondent.

While expressing a certain incredulity regarding whether the General Counsel could successfully withhold all or part of the affidavit from the Respondent, I agreed to inspect it *in camera*. Counsel for the Respondent Kirshman objected:

> I've never heard or seen an administrative law judge looking at a pretrial affidavit of a witness who has testified, whether there is an affidavit that exists—to determine whether there is anything in that affidavit that—that is useful to a respondent. I don't—see anything in the rule—in the Jencks Rule that gives any—and I may be wrong—but gives any limitations on my accessibility to anything that a witness who has testified on behalf of the General Counsel has signed or adopted.

A discussion of the provisions of the Boards Rules and Regulations Section 102.118 occurred. I held: "[M]y job is to look at the affidavit and give [Respondent] anything which is even arguably relevant for the purposes of cross-examination and thats what I intend to do."

Counsel for the Respondent Kirshman further objected that perusal of the affidavit in cameraT1 by the trier of fact could result in prejudice to the Respondent in that the judge could be

exposed to matters which were not received into evidence. I agreed that such a risk was arguable, but that such a risk was inherent in the nature of any in *camera* process and, more particularly, was the process provided for in the Boards Rule and Regulations Section 102.118[20] I ruled that the Respondent must elect one of two choices: counsel could simply do without the affidavit and thereby obviate my in cameraT1 inspection or, in the alternative, counsel could have me inspect the affidavit *in camera* and would be provided with those portions of the affidavit that I considered disclosable under Rule 102.118 after such inspection. Given the choice, counsel for the Respondent elected that I not inspect the affidavit. I therefore allowed the General Counsel to retain the affidavit without an in *camera* inspection. Counsel for the Respondent cross-examined the witness without the affidavit.

On brief counsel for the Respondent addresses the issue. At note 19, p. 22, the Respondent argues, in part:

> The ALJs ruling is not consistent with Section 102.118 of the Boards Rules and Regulations in that the basis for the in cameraT1 request was not "privilege, but "relevance and the ALJs insistence upon an "in cameraT1 look as a condition precedent to providing the affidavit to the Respondent was an abuse of discretion, in violation of Section 102.118.

I have considered the Respondent's argument on brief and reaffirm my ruling here. The General Counsel stated on the record he had in his possession an affidavit of the witness. The General Counsel then asserted there was nothing relevant in the affidavit which could be used by the Respondent for purposes of cross-examination of the testimony of the witness. To establish that fact and avoid disclosing the affidavit of the witness, the General Counsel sought to shelter the affidavit from disclosure by invoking the procedure set forth in the quoted portions of the Boards Rules Section 102.118. That procedure provides for an in cameraT1 inspection of the affidavit by the judge whenever there are claims by the General Counsel that the affidavit contains "matter which does not relate to the subject matter of the testimony of the witness The procedure undertaken at the trial was therefore provided in Rule 102.118(b)(2). While the Respondent took the only action it could under the rule to avoid judicial inspection of the affidavit, it cannot now complain of the consequences of the election it took.

2. The three categories of employees alleged to have been illegally discharged

In order to make the analysis and conclusions as intelligible as possible, the allegations of the complaints have been divided into three categories and dealt with separately below. The first category addresses the employees terminated on January 5, 1994, admittedly because of their conduct on that date. The second category covers the termination of Bernard Peter Williams. The third category deals with the termination of Albert Crockett.

[20] The Boards Rules and Regulations Sec. 102.118(b)(2) provides in part:

> If the General Counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the Administrative Law Judge shall order the General Counsel to deliver such statement for the inspection of the Administrative Law Judge in camera

a. The employees discharged because of the events of January 5, 1994

(1) Credibility resolutions

The events relevant to resolution of the discharge allegations centered on January 5 events are generally set forth in the "Events portion of this decision, above. Several areas of conflict remain to be resolved. Generally, as indicated supra, I did not find any employee to be deliberately fabricating his testimony. The events in issue involved a large noisy crowd and much confusion. It is clear that not all employees heard all of the various remarks or saw all the activities occurring near the entrance door or thereafter in their exit from the premises to the vacant lot and in their subsequent attempts to return to the premises and go to work.

There was considerable testimonial conflict respecting whether or not the entry door was locked after the buzzer sounded. Having considered the testimony of the witnesses on this aspect of events, I find that is most probable that the door was briefly locked or seemed to be locked at the time Broughton tried the door—thus I credit his testimony as well as the corroborating testimony, but that on Williams return outside and thereafter the door was unlocked. Thus, I also credit those employees who testified that they were able to enter the building through the unlocked door at those times. This resolution also explains, at least in part, certain discrepancies in prior written statements of witnesses respecting whether or not the door was locked.

Substantial dispute and difference existed as to whether or not Oliver Williams at various times during his remarks told the employees: (1) that they simply had to leave the premises or (2) that the employees had to either go to work or leave the premises. I find that Williams, as he testified, gave the employees a choice. This is consistent with the testimony of many witnesses including Charging Party Adamson. Further it is the more probable action given that Williams had told Isola he would try to get the men inside. Finally it is also consistent with the testimony of officer Gandy that the police told employees they had to leave or go to work. Again I do not believe the witnesses who did not hear these remarks were fabricating their testimony. The noise and confusion of the crowd made it virtually certain that all that was said and done would not completely be heard or seen by some and the rush and complexity of events also made it likely that not all recollections would be accurate or complete.

While there was no contrary testimony respecting Hiltons conduct in the vacant lot, counsel for the Respondent made the following arguments in his opening statement:

> Jimmy Hilton, clearly a supervisor, he got a call on his radio telling him that there was a problem. Now, Hilton got back well before Isola got back, and as he came in he saw police escorting employees out of the companys yard across the street to what appeared to be an empty lot, and he saw a congregation of people there.
>
> Hilton has worked at the company for many, many years, and I would venture to say that he probably knows virtually every one of those people by sight. He went over to a group that included Albert Crockett, and in sum and substance Hilton said, "You—whatever you guys are doing, youre doing it the wrong way. I dont think your Union is supporting you, go back—come—come on in. Ritchie is not here, and he said that when they said, "Al has

has got to go back to work now, and he said, "Ritchie is the only one who can make that decision. I promise you I will deal with that first thing tomorrow. Meanwhile, come on back, Ritchie is not here, Ill get you in.

He turned—and then he turned to Crockett and said, "Al, tell these guys to go to work, and Crockett's response is very significant, and it—and we have testimony not from just Hilton about this—Crockett's response was, "Theyre grown men, theyll do what they think is right, or words to that effect.

Hilton turned, went back in, nobody followed him. He stayed in there for—

JUDGE ANDERSON: What time is this, roughly, counsel?

KIRSHMAN:: Well, this has to be after 1:05 because the police were already there, but before 1:30 because Isola was not there.

JUDGE ANDERSON: Very well. Im sorry I interrupted.

KIRSHMAN: Thats okay. Im sorry to take so long, but I really feel that you need this background. When Hilton walked in and nobody followed him, Hilton will testify that the door was not locked, he just walked through the door.

Further, Andrews testified regarding Hiltons second conversation with employees:

Q. Now, did Hilton return to you later that afternoon?

A. Uh-huh.

Q. And what did he tell you at that time, if anything?

A. Well, when he came—after the owner went in, he—Jimmy Hilton went behind him shortly after that for—I dont know, 20 or 30 minutes, and then he came back out and informed us as of—he said, "I tried to tell you guys what you were doing, but you wouldnt listen. I want you to go back to work. You just wouldnt listen. And, as of right now, all of you have been terminated.

An opening statement is not evidence, but rather is only the hope and expectation of counsel as to the evidence that will be offered. As noted, supra, Hilton did not testify. It is clear however that the Respondent does not acquiesce in the testimony of the others respecting these events. Further, as noted, Andrews testimony about Hiltons remarks raises, at least, issues of internal inconsistency respecting what Hilton told employees. Given this state of affairs, I have reviewed the record and the testimony of the various witnesses in particular to determine what Hilton did and said.

Based first on demeanor and second on the lack of direct challenge, I credit the mutually corroborative testimony of Andrews, McMurray, Crockett, and Adamson respecting what Hilton said to employees. Thus, I find that Hilton solicited Crockett to assist him in getting the men back to work, that Crockett did so, that the men attempted to go back to work in response to his offer and, finally, that the employees were denied entrance onto the Respondent's property by the Respondent's security staff. Having considered all the evidence including the demeanor of the witnesses and the positions of the parties, I specifically reject the proposition that Hiltons solicitation of the employees was not actively supported by Crockett or that the employees did not in fact accept Hiltons offer and attempt to go to work. Thus I find that, while it may be true that when Hilton returned from the lot to the facility the employees did not join him, this was because the employees were prevented from doing so by the Respondent's agents who denied the employees entrance to the premises.

(2) The General Counsels prima facie case

The General Counsel argues that the employees discharged on January 5, 1994, were engaged in protected concerted activity in listening to Albert Crockett's recitation of events concerning his discharge and grievance and in discussing Albert Crockett's discharge and union grievance among themselves. The Board has long held that such activity, without more, is protected and that any discharge of employees for such reasons violates Section 8(a)(3) and (1) of the Act. Indeed, the Respondent does not seriously contest such an assertion.

Further in *Ideal Dyeing & Finishing Co*., 300 NLRB 303 (1990), the Board held that an employers mistaken belief that an employee has engaged in unprotected activity in the context of union or protected concerted activity is a violation of the Act as held by the Supreme Court in *Burnup & Sims,* 379 U.S. 21 (1964), even if the employees protected activities were unknown to the employer. The Board characterized the Courts *Burnup & Sims,* holding supra at 303:

> Rather, [the Courts reasoning in *Burnup & Sims*] it extends to all cases in which employees are erroneously disciplined or discharged because of alleged misconduct arising out of protected activities that are known to the employer, whether or not the affected employees actually took part in the protected activities.

Thus, on the facts of this case, the entire group of employees discharged because of the January 5 events may be regarded as having either: (1) engaged in protected activities or (2) were believed by the Respondent to have engaged in protected activities. There is therefore no real issue in the case that the employees admittedly terminated by the Respondent as a result of their conduct on January 5 were improperly terminated absent some valid defense which would justify such a discharge even in the context of protected activities.[21] Thus the General Counsel, in essence by the admission of the Respondent, has sustained his prima facie case. Having found that the

(3) The Respondent's defenses

The heart of the unfair labor practice litigation of these allegations was the disputed contentions of the Respondent that the employees discharged as a result of their activities on January 5 were engaged in two independent forms of unprotected conduct for which discharge by an employer is permissible.

The first type of conduct alleged to have occurred may be characterized as attempts by union-represented employees to deal directly with the employer in contravention of their exclusive collective-bargaining representative. the Respondent cites as controlling precedents: *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975), and *Certified Grocers of Illinois*, 273 NLRB 1608 (1985). See also *Energy Coal Income Partnership 1981-1*, 269 NLRB 770 (1984), and *River Oaks Nursing Home*, 275 NLRB 84, 86 (1985).

[21] General Counsel has sustained his prima facie case, it is appropriate to turn to the Respondents defenses.

Indeed, the respondent counsels willingness to so frame the issues at trial resulted in a more efficient and narrowly focused litigation and is to be commended.

The second class of unprotected conduct alleged to have occurred is conduct inconsistent with the collective-bargaining agreements no-strike no-lockout provisions quoted in part supra. The Respondent argues, citing the lead cases: *Teamsters Local 174 v. Lucas Flour Co.,* 369 U.S. 95 (1962), and *Gateway Coal Co. v. Mine Workers Local 633*T1, 414 U.S. 368 (1974), that engaging in a strike in contravention of a valid no-strike clause is unprotected activity.

The General Counsel does not challenge the black letter law invoked by the Respondent, but rather seeks to distinguish both doctrines legally and factually from the situation at hand. The parties argued the relevant factual and legal distinctions ably and at length.

(a) The Respondent's Emporium Capwell defense

(i) The parties arguments

The Board in Certified GrocersT1, supra, characterized the Courts decision in Emporium CapwellT1, as holding that "the exclusivity principle of Section 9(a) of the Act proscribes attempts by a minority of employees to engage in separate bargaining with their employer. The Respondent argues that the committee in its December 22, 1993 meeting with Isola and in picketing on December 23, 1993, was attempting to separately bargain with the Respondent in a manner inconsistent with and not supported or condoned by the Union which represented the employees bargaining unit. The Respondent argues further that Lucas remarks to Oliver Williams and others the evening of January 4, 1994, the conduct of the employees on the afternoon of January 5 and the statements of Crockett and Lucas in the meeting between Isola, McClone, and the employees later on January 5, all demonstrate that the events of January 5, 1994, were a seamless continuation of the events of December 22 and 23, 1994, and were therefore unprotected as violative of the exclusivity principle described above.

The Respondent's view as advanced at trial and on brief is that Crockett and Lucas and others of the committee entered the new year determined to advance their own agenda by forcing the Respondent to acquiesce in the committees demands respecting working conditions. The Respondent argues that Crockett's discharge was simply a wedge issue used by those individuals to gain support for the committees broader agenda. Thus, the Respondent argues that Crockett chose the January 5 time for his inciting the employees because he well knew that Richard Isola was the only agent of the Respondent who could address his grievance at that time and, more critically, because he knew that Richard Isola and other high officials of the Respondent were at the funeral and related gatherings respecting the interment of Alfred Isola. Thus, argues the Respondent, Crockett rather than waiting for the scheduled grievance meeting to be held the following day came to the work place on January 5 and, concealing the fact of the upcoming grievance meeting with the Union and the Respondent the following day, agitated the employees respecting his discharge to exert pressure on the Respondent to acquiesce in the committees demands. The Respondent argues that the January 5 meeting sustains this view.

The General Counsel perceives the events of January 5 altogether differently. Initially counsel for the General Counsel argues that the January 5, 1994 events were independent of and legally separate from the actions of the committee in December 1993. Thus, the General Counsel argues that, while the termination of Crockett could certainly be viewed as retaliation for the efforts of the committee, the termination issue as perceived by Crockett and discussed by him with the employees in the area outside the Respondent's facility on January 5 dealt not with the committees agenda, but rather the unfairness of Crockett's termination in that he was being told he should have reported his pitchers salvaging and was discharged for that reason.

(ii) Analysis and conclusions

The hallmarks of Emporium CapwellT1 unprotected activity are: (1) the efforts of employees to bargain directly with the employer and (2) the fundamental independence of and inconsistency between the employees position compared and contrasted with that of the union that represents them. The Board in Certified GrocersT1, supra, found employee picketing of the company headquarters in support of their grievances unprotected where the employees were seeking to engage in direct bargaining with the employer separate and apart from the union that represented them.

The actions of the committee on December 23, 1993, are similar to the situation presented in Emporium CapwellT1 and Certified GrocersT1. In each case a group of employees, not supported by nor supportive of the union that represented them, sought to deal directly with their employer in a manner independent of and inconsistent with the existing collective-bargaining agreement and their exclusive representative. Although the Respondent does not assert that any employee was discharged or discriminated against primarily as a result of the activities of December 23, 1993, the Respondent argues that those activities were unprotected under Emporium CapwellT1.

An examination of the events of January 5, in isolation from the earlier circumstances in December does not present a dichotomy between Crockett and the employees position and that of the Union. First, Crockett's discharge and the grievance based on it was being maintained and supported by the Union and was being processed under the collective-bargaining dispute resolution process. Indeed a grievance meeting to be attended by Crockett, the Union, and the Respondent was scheduled for the next day. At the meeting held on January 5, 1994, between agents of the Union, the Respondent, and Crockett, the Union and Crockett were not in disagreement respecting the matter. Further, at no time did Crockett or employees seek to deal directly with the Respondent bypassing the Union. Thus, Crockett made absolutely no demands on the Respondent and repeatedly turned down Oliver Williams solicitation to come in and discuss his discharge and grievance. The Board and the Seventh Circuit Court of Appeals in Dreis & Krump MfgT1., 221 NLRB 309 (1975), enfd. 544 F.2d 320 (7th Cir. 1976), held that an employee who was discharged for handbilling employees at the start of his work shift with materials supportive of his grievance then in the grievance process was not engaged in unprotected activity of the type described in *Emporium Capwell.*

The Respondent argues however that the events of January 5 were but a continuation of the events of December 22 and 23 and January 4 and were simply another unprotected attempt by the committee members, Lucas, Crockett, and the employees who were drawn into their web to pressure the Respondent into meeting the committees demands. The General Counsel challenges these factual contentions of the Respondent arguing that the events of January 5 stand independent of all aspects of the committee and its December 1993 conduct.

It is no doubt true, as Oliver Williams and others testified, that the Respondent's agents suspected that Crockett was seizing on his discharge as an event to be used to kindle employee support for the larger issues of the committee. Williams and others noted the remarks of Lucas on the evening of January 4 that the employees still had a broad range of grievances and that a strike might be contemplated. There is no doubt that Richard Isola felt that Crockett had knowingly timed his actions to coincide with the Respondent's managements absence from the facility during the funeral ceremonies and gatherings respecting Alfred Isola. The feelings of the Respondent's agents at the time and the arguments of counsel for the Respondent at trial and on brief are not frivolous and have been carefully considered.

Based on all the record as a whole as well as the demeanor of the witnesses, I find insufficient evidence to establish that the events of January 5 were other than exclusively related to the termination of Crockett and the processing of his grievance in regard thereto. I credit the testimony of Crockett that he voiced only complaints respecting his discharge and the processing of his subsequent grievance to gain the support of his fellow employees and did not refer to the events of December 23, 1993, nor related matters. I further find that the response of those employees who were supportive of Crockett sounded on that narrow issue[22] and that the larger "Committee grievances as discussed in committee Sunday meetings and as discussed with Richard Isola on December 22 were not underlying factors in the January 5 events.[23]

Further, I find it significant that Albert Crockett made no demands on the Respondent's agents during the events in controversy. He specifically denied to Oliver Williams that he was asking the men not to go to work. He made no response to the repeated invitations of Oliver Williams that he come into the building and discuss his grievance. Thus, no attempt to deal directly with the Respondent occurred respecting the January 5, 1994 events. While Crockett participated with Lucas in the January 5 meeting with Richard Isola and McClone, the record suggests that they were invited to do so by Hilton and that the Union either sought or did not oppose their presence.

Relevant to this analysis is the Board decision in Bridgeport Ambulance ServiceT1, 302 NLRB 358 (1991), enfd. 966 F.2d 725 (2d Cir. 1992). In that case the employer was seeking to establish that certain employees conduct was unprotected under Emporium CapwellT1. The Board affirmed the administrative law judge who found the conduct at issue did not lose the protections of the Act under Emporium CapwellT1. It noted id. at 358 fn. 2:

> We affirm the judges determination as to the relevancy of testimony concerning employee sentiments about the Union prior to the April 18, 1989 walkout. The issue before the judge was the motivation for the employees walkout, and the judges ruling did not prevent the Respondent from eliciting testimony on that issue. In any event, the termination of employee Leill was the primary precipitating factor in the walkout, and evidence of generalized dissatisfaction with the Union would not establish the employees actions were unprotected.

Applying that factual analysis here, I find that Crockett's discharge was the primary precipitating factor in the events of January 5, 1994. Given that finding coupled with my finding that the employees did not attempt to deal directly with the Respondent respecting the Unions grievance respecting the discharge, I reject the Respondent's assertion that the employees activities were rendered unprotected by application of the doctrine enunciated in *Emporium Capwell*.

(b) The Respondent's defense that the employees were engaged in an unprotected strike

(i) The parties arguments

The Respondent argues that the employees actions on January 5 rose to the level of a concerted withholding of their labor, i.e., a strike, through their refusal to enter the building and commence work despite the repeated pleadings of the Respondent's agents and despite the employees repeatedly being told that what they were doing was wrong and would lead to their discharge. The Respondent argues that, faced with a refusal of its employees to come to work, it took the reasonable and prudent decision to expel them from the property and thereafter discharged those employees who refused to work as scheduled. As noted above, the Respondent correctly points out that the then current collective-bargaining contract contains a no-strike clause. Further, the Respondent notes that longstanding Board and court law make it clear that employees who act in contravention of the no-strike provisions of a valid agreement may be terminated.

The General Counsel challenges the Respondent's contention that the employees consciously withheld their services from the Respondent, refused to report to work, or that the Respondent had any reasonable basis for believing such was the case. Rather the General Counsel argues that the employees simply initially declined to acquiesce in Oliver Williams exhortations that they discontinue listening to Albert Crockett's report concerning his discharge and grievance and enter the facility ahead of time. Thereafter, in the confusion of the moment and the press of the crowd, without any organized plan or strategy and without any action to pressure the Respondent to grant any concessions or to protest any of its policies, the employees failed to enter the building timely and the 12:45 p.m. buzzer went off. Thereafter, the General Counsel argues, the employees were simply acting to avoid difficulties with the police and continued to make it clear they wished to work.

The General Counsel notes that following some confusion respecting whether the door was thereafter locked as is consistent with the Respondent's practice of a least several years employees were told they had to leave the premises and that the police had been called. In leaving the premises the employees were simply avoiding conflict with law enforcement. Thus the General Counsel argues on brief at 26:

> [T]he 70 drivers were locked out on January 5 and subsequently discharged for engaging in protected activity and nothing more, especially when the lock out occurred 15 minutes before these employees were to start work.

[22] There is no evidence that any of those employees were considering any matter save Crocketts discharge in taking the actions they did on January 5, 1994. Since I have found that Crockett was not exhorting them on behalf of the committee or its agenda, there is no credible indirect evidence that they were acting in furtherance of that agenda.

[23] To the extent that Committee President Albert Crocketts discharge was regarded as unfair by employees, there was doubtless some suspicion that retaliation for Crocketts activities on behalf of the committee was involved. Importantly however this was never a subject of Crocketts remarks on January 5 and was not, on this record, a subject of discussion that day.

The General Counsel argues further:

> The Employer may well have feared an employee strike because employees had picketed the Employer two weeks earlier. However, the employees failure to enter the Employers door by 12:45 p.m. appears to have been a result of the confusion of the moment, and the Employers own conduct,[14] and not as a result of any strike purpose.

[14] One must consider the fervor of the Respondent in the actions that it took that day. Richie Isola had just returned from the funeral of his uncle (who was the founder of the Company) and he was quite upset when he arrived at the facility after 1 p.m. and apparently told Jimmy Hilton that he wanted the men terminated. Then there is Oliver Williams fuming over the protected concerted activities of the day shift employees. (On Br. at 25.)

(ii) Analysis and conclusions

(aa) Initial findings and chronology

Initially, based on the credibility resolutions noted above and my further findings, I reject the General Counsels argument that the employees at no time withheld their services, but were rather simply victims of the Respondent's overreaction. As noted above, the Respondent's agents repeatedly communicated their desire that the employees come into work prior to the 12:45 p.m. buzzer. While there was no obligation on the part of employees to enter the building early under the Respondent's rules, the employees were clearly made aware of the need to enter and remained outside to engage in the protected concerted activity of listening to and discussing with Albert Crockett the circumstances of his discharge and grievance.

At and past the sounding of the buzzer, as found, supra, Williams made it clear he wanted employees in the building and that, if they did not come to work, they had to leave. I have found that, if the door was briefly locked, it was not locked or barred at critical periods and that there was no impediment to employees going to work essentially throughout all relevant times. I further found that the police, after talking to Respondent's security, told employees they were either to go to work or leave the property. I do not accept the argument of the General Counsel that employees left the premises simply to avoid trouble with the police. I do not doubt the assertions of Crockett that African-American men have reason to avoid conflicts with police in America—that is one of the tragedies of our nation. The testimony of officer Gandy was uncontradicted, however, that officers gave the men a choice: they were being told to leave onlyT1 if they would not go to work. That same choice had been regularly put to the men up to that time by Respondent's foremen and I specifically credit the officers testimony that the employees were presented with the choice yet again.

I have credited Crockett's testimony that he intended no strike on January 5 and I have further found that there is simply no evidence that employees came to work with any thought of other than simply working that day. I also find however that the employees listening to Crockett and discussing the matter with him and among themselves became indignant respecting the discharge. The employees were in fact impassioned to a greater or lesser degree. No large group of employees in such circumstances holds a single common passion or purpose. I have found above that there were a variety of motives causing the employees to stay outside rather than enter the building and go to work as was customary. The simple fact, however, is that on listening to Crockett at least the main motive of the employees to remain in the area and not enter work was a desire to hear out Crockett and not acquiesce in the exhortations of the Respondent.

Contrary to the Respondent's opening statement however, I specifically find that the Respondent's agent Hilton in the vacant lot solicited employees, yet again, to return to work and at that time, under Crockett's urging, the employees agreed to return to work and attempted to return to the facility to commence work only to be physically denied access by security guards of the Respondent. Only after this sequence of events occurred was the decision made by Richard Isola to terminate the individuals.

It is appropriate to place my findings respecting January 5, 1994 events in a simple and necessarily approximate chronology.[24]

The timing of events the afternoon of January 5, 1994, at the Respondent's facility

to 12:45 p.m.—Employees are not obligated to be within the building under the Respondent's rules. Crockett addresses employees in the area outside the building respecting his termination and grievance. The Respondent's agents repeatedly address the group telling them: (1) what they are doing is wrong, (2) that they must come inside, (3) that they risked being locked out and terminated.

12:45 buzzer—The Respondent's normal rule is that employees must be through doorway by 12:45 or they are excluded for the day and disciplined for tardiness is invoked. The Respondent's agent again exhorts employees to enter building under threat of termination. Some few employees enter unlocked door. Most remain outside.

12:45–12:50—The Respondent's facility staff calls police, notifies the Respondent's agents Richard Isola and Hilton of the problems at facility.

12:50–12:57—The Respondent's agent Williams announces to employees he has talked to Richard Isola and that Isola wants them at work or off the property. He also tells the employees that the police have been called and that they will receive their paychecks off the property.

12:58–1:10—Police arrive and inform employees they must go to work or leave property. Employees who enter the

[24] The description of events contained in this summary are not independent findings of fact, but are rather an abbreviated summary of specific findings made else where in this decision to facilitate the location of events in time. The particular times noted were in part located based on certain seemingly accurate basing points. Thus, there is no doubt that the buzzer rang 12:45 p.m. and witnesses were able to use that fact as a reference point. Police timekeeping records established that Officer Gandy was called at 12:50 or 12:51 p.m. and arrived at the facility at 12:57 or 12:58 p.m. Respondent of necessity had to notify the police at least a minute or two before Officer Gandy was notified. Respondent's agent's, Williams, address to employees that the police were coming had to occur before they arrived. Williams' telephone conversation with Isola occurred before the police arrived and before his warning to the employees that the police had been called and that Isola wanted them to go to work or get off the property. Respecting the Hilton conversation, unchallenged witnesses placed his arrival at the vacant lot as occurring very soon after the employees congregated there.

building by 12:45 and punch in, are paid as of 1:00. Employees leave property and gather on adjacent vacant lot.

1:15–1:30—The Respondent's agent Hilton arrives at lot, exhorts men to return to work and asks Crockett's assistance to that end. Crockett also urges the men to return to work. The employees attempt to return to the Respondent's premises, but are denied access by security guards. During the process Richard Isola returns to facility and observes events as he enters. Hilton returns to facility.

1:30 and after—Isola is informed of events and determines all employees outside are to be terminated. Hilton returns to lot and informs employees they are fired. Meeting is held with Union, the Respondent, Charging Party Crockett and others.

(bb) Did the employees conduct fall within the definition of a strike?

The threshold question in this aspect of the case is: What is a strike for purposes of evaluating an employer's right to take action against those who violate the terms of a no-strike clause?

The General Counsel relies on the Board's decision in *Empire Steel Mfg. Co*., 234 NLRB 530 (1978). In that case a union official called an employee meeting at the end of a luncheon period and extended the meeting some 10 minutes into the work shift. The union official was fired for calling a work stoppage in violation of a no-strike clause. Addressing the strike and no-strike clause issues which formed the basis for the employers defense to the discharge, the Board adopted the decision of the administrative law judge who held:

> Also rejected is the Respondent's argument that the intrusion into working time vitiated the meetings protected status because the attendant interference with production or because it thereby became a work stoppage in breech of the no-strike clause. There was no evidence of the extent, if any, that production was impaired. Without such a showing, and remembering the expansive reading to be given Section 7 [of the Act], it cannot be said that the brief interruption occasioned by the meeting bore sufficiently upon production to destroy the meetings Section 7 standing. *Shelly & Anderson Furniture Mfg. Co. v. NLRB*, [497 F.2d 1200 (9th Cir. 1974)]. See also *Hospital Employees District 1199-E (CHC Corp.)*, 229 NLRB 1010 (1977); *Trustees of Boston University*, 224 NLRB 1385 (1976); *Masoneilan International, Inc*., 223 NLRB 965 (1976); *Serv-Air, Inc*., 162 NLRB 1369 (1967).
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> *Michigan Lumber Fabricators, Inc*., 111 NLRB 579 (1955), and *Terri Lee, Inc.,* 107 NLRB 560 (1953), cited by the Respondent, are distinguishable from the present case in both degree and kind. They involved employee meetings away from the plant cutting far more into production time—1-1/2 hours in one and a full day in the other.
>
> Nor is there any evidence that the no-strike clause in speaking of "strikes, slow-downs or work stoppages, contemplated interruptions of this sort. Therefore, since those terms normally envisage conduct intended to bring pressure upon an employer to change his ways (*Hospital Employees District 1199-E (CHC Corp.)*, supra, *Eagle International, Inc*., 221 NLRB 1291 (1975); *Terri Lee, Inc*., supra at 562); since the meeting in question had no such purport, instead being informational; [footnote omitted] and since Section 7 rights are not to be casually dealt away, it would be overreaching to treat this interruption as covered by the no-strike proscription. [*Empire Steel*, supra at 532.]

In *Asbestos Removal*, 293 NLRB 352 (1989), a judge with Board approval held that a refusal to commence work lasting about 1 hour was a strike within the meaning of the contracts no-strike clause.

The General Counsel also advances and the Respondent attempts to distinguish the Boards decision in *Anheuser-Bush*, *Inc*., 239 NLRB 207 (1978), in which the Board again emphasized, in finding certain conduct by employees not to be a strike, that there was no evidence that the employee intended his action either to pressure the employer to grant any concessions or to protest any of its policies. In addressing this doctrine the General Counsel asserts that in the instant case, the employees actions were not intended to bring pressure on the Respondent to change its ways while the Respondent asserts to the contrary that they clearly were.

Empire Steel is now cited by the Board as "defining a strike as conduct intended `to bring pressure upon an employer to change his ways, *BMC America, Inc*., 304 NLRB 362, 364 (1991). Helpful in establishing just what the Board means by this is the Boards decision in *Hospital Employees District 1199-E (CHC Corp.)*, supra, which was cited by the judge in *Empire Steel* as quoted supra. In *District 1199-E* the employees involved had left their workstations for a total of 5 to 15 minutes each in order to track down a management representative to demand to hold a grievance meeting. In holding the actions were not a strike the Board held, 229 NLRB at 1011:

> Furthermore, the employees conduct herein was not intended to bring pressure on the [employer] through interruption or stoppage of work and cannot, therefore be regarded as a "strike within the meaning of Section 8(g) of the Act. Instead, the employees engaged in a spontaneous reaction to the [employers] flouting of its statutory obligation to them. Their purpose was simply to confront the [employer] with its disruptive conduct and to communicate in person their sense of outrage and frustration. The interruption of work did not exceed the time required to satisfy this objective.

Applying these standards to the facts at hand, I find that the employees January 5 activities rises to the level of a strike as defined in the cases. First, in disagreement with the General Counsel, I find the conduct at issue, at least after 12:45 p.m. was designed in part to put pressure on the Respondent to be more generous in its handling of the Crockett grievance than it might otherwise have done, if it did not know of the employees willingness to refrain from commencing work as scheduled in solidarity with Crockett and his grievance. The spontaneous activities and reactions to confusing circumstances discussed in the cited cases as not being designed to put pressure on an employer to change its ways are distinguishable from the situation presented here because any confusion or indignation was induced by Crockett as part of the employee gathering itself and did not directly arise out of either the Respondent's handling of Crockett's discharge or its handling of the grievance. Thus, it was not the events or circumstances of Crockett's discharge or the Respondent's conduct in processing the grievance—beyond and apart from the fact that the employees did not think the Respondent's discharge of Crockett just or proper—that caused excitement, confusion, or spontaneous protest.

Second, I find the duration of the employees refusal to commence work, lasting from 12:45 to about 1:20 or 1:25 p.m., a period of some 35 to 40 minutes, given all the circumstances including the election to leave the premises rather than go to work, is of sufficient duration to qualify as a strike. This latter finding is a close question indeed given the gap between the shorter 15 minutes or so in duration events held not strikes, as noted supra, and the longer duration stoppages of an hour or longer held to be strikes, supra. I am so persuaded here because even had the employees after accepting Hiltons offer to return to work been allowed to do so by security, it would surely have taken at least 10 minutes to organize an orderly entrance into the facility and thus the ultimate delay involved would have likely been closer to a full hour.

These two criteria, sufficient duration and coercive purpose, having been satisfied, I find the employees actions qualify as a strike. I further find that the no-strike clause in place between the Union and the Respondent at relevant times prohibited such conduct. Accordingly, I find the conduct of the employees, while protected generally, was rendered unprotected by application of the no-strike clause. Therefore the employees were subject to discipline including discharge unless their conduct was condoned by the Respondent.

(4) Did the Respondent condone employee misconduct

I have found that the Respondent's employees were not engaged in unprotected activities within the meaning of *Emporium Capwell*, but that they were engaged in conduct in violation of the no-strike clause in the contract between the Respondent and the Union. The latter finding as well as the possibility that reviewing authority may reverse the former finding each raise the issue of condonation[25].

The Board with court approval has established the principle that:

> [W}here employees engage in concerted activity which, although otherwise lawful and protected, is rendered unprotected by some improper aspect of the employees conduct, such as a breach of a no-strike clause, but the employer forgives or condones the strike, he will thereafter be estopped from asserting the unlawful nature of the strike as grounds for discharge. *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 102 (7th Cir. 1971).

In *Davis & Burton Contractors*, 261 NLRB 728 (1982), the Board held that, when an employer satisfied a picketing employees demands so that the employee ceased picketing and returned to work without incident for a period of days or weeks until an economic layoff, the employer had condoned the picketing and it could not then assert the unprotected conduct as a basis for refusing to reemploy the employee.

The Board and the courts have differed from time to time respecting what constitutes condonation in given situations. The Board reviewed its condonation doctrine in *General Electric Co.*, 292 NLRB 843 (1989). In *White Oak Coal Co*., 295 NLRB 567 (1989), the Board in a scholarly analysis of the history and development of the cases to date held, in conformity with various circuit courts of appeals decisions, that where an employees relationship with an employer has not been terminated by the employer at the time of condonation, the employers simple offer of reemployment may be sufficient to condone the conduct at issue.

In *Asbestos Removal*, 293 NLRB 352 (1989), a group of employees unhappy with the absence of shower facilities on the job told their supervisors to summon the superintendent and delayed commencing work until his arrival about 1 hour later. The supervisor on his arrival told the men to either go to work or get off the job. This admonition did not produce results so soon thereafter the superintendent sent his foreman to reassert the employers order that the men should go to work or leave. The employees answered that the problem had not as yet been solved. The superintendent again told the men to go to work or get off the job. Following further conversation the foreman instructed security guards to remove the employees. At that point a second foreman, Middleton, arrived and announced that the job had been shut down. When asked by a spokesman for the employees whether they would be called to resume work when the job opened again, the foreman said he would call the employees back to work. The employees were then escorted of the site. The employees were never contacted to work again and were thereafter terminated.

The Board approved the decision of the administrative law judge who held that, although the employees had been engaging in an unprotected strike in violation of a no-strike clause in the collective-bargaining agreement, the employer had condoned their conduct. The judge stated at 293 NLRB at 356:

> I have credited testimony to the effect that Middleton told employees that there was going to be a meeting on Thursday and that they would probably be work on Friday, and that the Company would get in touch with the employees who were then escorted from the premises . . . . Middleton's words also amounted to condonation of the refusal of the employees to work on March 23 because a shower had not been installed. His directions also disclosed that as of the moment the employees in question were leaving the jobsite the Respondent had not decided their fate.

Having found the employer had excused the fact that their walkout had taken place in violation of the contract, their activity was held protected and the employers discharge of the employees a violation of Section 8(a)(1) of the Act.

Turning to the situation presented here, I find that at the time Hilton first spoke to the employees in the vacant lot, they had not been terminated by the Respondent. While the men had been told numerous times they were to go to work or they were going to be fired, locked out, or kicked off the property, the

[25] During the trial substantial colloquy occurred on the opening day respecting a narrowing of the issues in the case. While the question of the argued unprotected nature of the employees activities was well understood, the issue of condonation was acknowledged only as a potential issue in unprotected activity cases and never discussed in detail. The General Counsel generally took the position that no unprotected activity had occurred so that discussion of condonation was unnecessary. The Respondent also argued that condonation was not an issue on the facts of the case. In part this may have been because counsel for the Respondent in his opening statement specifically denied that Hiltons offer to the employees at the vacant lot to return to work was accepted by any employees so that, in the Respondents view, the strike continued past any arguable condoning statements by Hilton rendering the condonation doctrine irrelevant. As discussed supra, Hilton, however, did not testify and I credited the employees testimony, noted supra, that Hiltons offer of an immediate return to work was accepted by the employees.

I find the credited remarks attributed to Hilton fairly raise the issue of condonation, that condonation remained at all times a potential issue in the case which had never been waived by the General Counsel, even if not fully addressed by him, and that resolution of the condonation issues presented thereby are a necessary part of this decision.

very repetition of the conditional threat indicated that no actual termination had yet occurred. I find this was still the case when the men, then on strike and physically removed from the premises, were offered their jobs back by Hilton, who told them he had been notified by radio of the situation, had come to deal with the problem, that he knew what the men were doing was wrong and that he "needed them to come to work.[26] I have found the employees accepted this offer.

It was not disputed that Hilton, a route supervisor, was a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent. Indeed Hilton had been associated with the hire of virtually all the employees involved and had scheduled and participated in the great bulk of the events involving management described here. While it is clear that Hilton did not tell the employees he was conveying a message from Isola, he made it clear he would "on his own get the employees in to the facility to go to work and there is no reason on this record for the employees to have reasonably doubted Hiltons authority "on his own to put them to work.[27] Indeed, Hilton had been the first management official called by onsite supervision when they perceived difficulties ahead. Hilton made that fact clear to the employees in his initial conversation with them. I specifically find he had at least apparent authority during these events to have made the statements he did including his unconditional offer that if they agreed to go to work, he would get them into the facility to do so. His solicitation of the employees to go to work and his promise to get them back onto the premises and into the facility are attributable to the Respondent.

I find therefore that in the instant case the Respondent made an unconditional offer of an immediate return to work for all employees through Hilton, an important and knowledgeable agent of the Respondent who had long been connected to the Respondent's hiring process and was well aware of the larger issues and disputes involved here, to employees who had not been terminated. Coupled with the offer of an immediate return to work, Hilton acknowledged to the employees that he knew what the employees had been doing and thought it wrong, but that he needed them to come to work. Hiltons offer was completely accepted by the employees in the sense that they agreed to go to work and attempted to enter the property to do so, only to be excluded by the Respondent's security personnel. The statements of Hilton in the circumstances presented above and in light of the cases cited and the record as a whole convince me that Hiltons actions constitute a clear condonation of the employees conduct up to that time. Since the employees in accepting Hiltons solicitation that they go to work abandoned any unprotected activity from that point on, all unprotected employee activity found here was condoned or forgiven by Hilton.

It is true that the Respondent's security did not let the employees on the premises so that they never were allowed to start work. It is also true that Richard Isola soon thereafter determined to terminate the employees and that fact was communicated to them within the hour by Hilton. The cases seem clear however that once made and communicated to the employees, and after the employees had acted on the offer—in this case by making the thwarted attempt to return to work, the Respondent was simply not free to reconsider or rescind its earlier condonation. I find no special circumstances present in this case which distinguishes it from the cases cited.

In summary, I have found that the employees were engaged in a strike which was prohibited by the no-strike language of the applicable collective-bargaining agreement. I have further found that the Respondent through Hilton condoned the conduct of the employees to the time of their attempted return to work from the vacant lot adjacent to the Respondent's facility at which time the employees ceased all unprotected conduct and that the Respondent was thereafter "stopped from asserting the unlawful nature of the strike as grounds for discharge.[28]

(5) The situation as to employee Howard Clemons

One of the employees terminated for failing to enter the premises and start work on January 5, 1994, was employee Howard Clemons. He testified to a unique set of circumstances which, if credited, establishes that he was not in a position to work on January 5 and was seen about the premises only after having arrived well after the fact and was therefore a spectator rather than a protesting employee refusing to go to work that day. Clemons was a believable witness and the Respondent did not rebut any of his assertions. Rather the Respondent relies on the proposition that it carefully reviewed each individuals excuses respecting the January 5 events and found Clemons "story was not credible. (R. Br. at 25 fn. 21.) I find that Clemons did not in fact refuse to go to work during the events in contest on January 5 being otherwise engaged. I also find the Respondent's determination that Clemons excuse was not valid was mistaken. I find his excuse was valid and that he engaged in no unprotected withholding of his services that day.

Having found, supra, that the events of January 5 could not be the basis for the discharge of employees, Clemons, as part of the class of employees whose discharges were at issue, is included in the group of employees improperly terminated in violation of Section 8(a)(1) of the Act. Were these findings to be reversed by reviewing authority and the conduct of employees found to be a valid basis for discharge, however, I would still find that Clemons was not properly discharged because he did not in fact engage in the conduct at issue, i.e., either the protected concerted act of listening to Crockett or the subsequent unprotected activity of withholding his labor in the face of a no-strike clause. As noted supra, the Respondent's mistaken notion that an employee was engaged in unprotected conduct in the context of protected activity may not be the basis for termination. Ideal Dyeing & Finishing CoT1., 300 NLRB 303 (1990). Accordingly, I find Clemons was improperly discharged for conduct that he did not in fact engage in.[29]

[26] The respondent counsel characterized Hiltons offer in his opening statement:

[I]n sum and substance Hilton said, "You—whatever you guys are doing, youre doing it the wrong way. I dont think your Union is supporting you, go back—come—come on in. Ritchie [Isola] is not here, and he said that when they said, "Al [Crockett] has got to go back to work now, and he said, "Ritchie is the only one who can make that decision. I promise you I will deal with that first thing tomorrow. Meanwhile, come on back, Ritchie is not here, I'll get you in.

[27] In contrast to the "go to work exhortation he could make to employees on his own, Hilton took care to tell the employees that only Isola could deal with Crocketts personal situation.

[28] *Jones & McKnight, Inc. v. NLRB*, 445 F.2d 97, 103 (7th Cir. 1971). Were I to have found the employees conduct unprotected under *Emporium Capwell*, I would have found that conduct equally pardoned and condoned.

[29] There was never any doubt that the Respondent felt it was the failure of scheduled employees to enter the facility and commence work

(6) Summary and conclusions respecting the employees discharged—based on January 5 events

I have found that the employees terminated by the Respondent because of their actions in refusing to enter the facility and report for work for their scheduled p.m. shift on January 5, 1995, were all either engaged in protected concerted and union activity in support of Crockett's union grievance or, in the alternative, were believed by the employer to have been engaged in protected concerted activity—in each case that activity being the listening to and discussing with Albert Crockett the circumstances of his discharge and the state of his grievance respecting it. Inasmuch as the Respondent admitted discharging them for their activities on that day, I found that the General Counsel had established his prima facie case of a violation of Section 8(a)(3) and (1) of the Act.

Turning to the Respondent's defenses, I further found that the actions of the employees on January 5, including their refusal to enter the facility as described supra, did not fall within the scope of the Supreme Courts decision in *Emporium Capwell* as unprotected activities for which employees could be discharged.

I also found however that the refusal to enter the facility and commence work constituted activity prohibited by the no-strike language contained in the Respondent's collective-bargaining agreement with the Union. I therefore found that this activity was unprotected. I further found, however, that the Respondent's agent, Hilton, condoned the employees refusal to enter the facility and commence work by, inter alia, asking them to come to work and abandon their refusal. Further, when the employees accepted Hiltons offer and attempted to return to work—being thwarted only as a result of the Respondent's security agents denying employees access to the facility—they abandoned the unprotected conduct they had previously been engaged in. Thus, as a result of Hiltons statements and the employees actions, all unprotected refusals to work to that point were condoned and no further refusals occurred. I found that as a result of these actions the Respondent was estopped from asserting the unlawful nature of the strike as grounds for the employees discharge.

Having found: (1) that the employees were engaged in protected concerted activity on January 5 and had not engaged in any unprotected activity that had not been condoned, (2) that the Respondent had discharged the employees because of that conduct and, (3) that the Respondent had no valid basis for taking such action, I find and conclude that the Respondent in so doing violated Section 8(a)(1) of the Act. Further, I find that while Howard Clemons was fired on the same basis he did not in fact engage in any of the conduct described above and was therefore also terminated because the Respondent had a mistaken belief that he had engaged in protected activity as described above. I therefore make the additional finding that the Respondent in so doing further violated Section 8(a)(3) and (1) of the Act as to Clemons.

b. The discharge of Bernard Peter Williams

The General Counsels consolidated complaint in Cases 28–CA–12361, 28–CA–12365, and 28–CA–12365–2 alleges at paragraphs 5(b) and (c), 6, and 7 that Bernard Peter Williams was discharged on January 6, 1994, because of his support for the Union and other protected concerted activities in violation of Section 8(a)(3) and (1) of the Act. The Respondent argues that Williams was terminated because of violations of the Respondent's rules and not for any reason prohibited under the Act and, further, argues that the Bernard Williams matter was resolved under the parties contractual dispute resolution process and should be deferred to that resolution.

The issue of deferral to the arbitral process is a threshold issue to be decided before any consideration of the merits of the underlying unfair labor practice allegation. Accordingly, it is appropriate to address that issue at the onset.

(1) Is Bernard Williams discharge properly deferrable

(a) Circumstances respecting the dispute resolution process

Bernard Williams received a termination notice on Saturday, January 8, 1994, on arrival at work for an "Attendance Violation—No, Show, No Call for an alleged failure to timely call in on January 6, 1994. The Respondent amended the termination notice by letter dated February 11, 1994. A grievance was filed by the Union and was processed up to arbitration. The Union sought to arbitrate this discharge but was initially told by the Respondent that Williams discharge would not be arbitrated because he had been part of the January 5 events. Thereafter the Respondent agreed to arbitrate and the parties did so.

A hearing was held on September 14, 1994, before Arbitrator Eugenia B. Maxwell. On December 15, 1994, the arbitrator issued her award finding in favor of the grievant and directing, inter alia, that the "penalty of termination should be reduced to a three day suspension for the incident of January 6, 1994.

On December 27, 1994, union counsel wrote the arbitrator with copy to the respondent counsel: "requesting a clarification of the intent of your award." The letter asserted that the Union and the Respondent differed on the question of whether the award included backpay. On January 5, 1995, counsel for the Respondent also wrote the arbitrator with copy to union counsel opposing the request of the Union and asserting the arbitrator had no jurisdiction in the matter and the award was clear that it did not include backpay or any other form of a make-whole remedy. Counsel for the Union responded opposing the Respondent.

On January 5, 1995,[30] the arbitrator mailed a book letter to each party which asserted in part:

> I am sorry that my award was not clear in regard to the reinstatement of Grievant. Please substitute page 15 for the prior page 15. In my award, I intended for Grievant to receive back pay from the date of termination until the date of reinstatement except for the period of the three day suspension. I intended for his other benefits, seniority, etc. to remain in effect as if he had not been terminated.

The enclosed new page 15 of the original arbitration award provided, inter alia, the following additional language:

> Grievant should be reinstated with full back pay for the date of termination until the date of reinstatement except for the period of suspension during which he should not receive back pay but his seniority, health and other contractual benefits excluding back pay should remain in full force and effect

that was wrong and the basis for termination. Thus, Crockett and others who were not scheduled to work that day were not disciplined for their conduct.

[30] It is evident that a certain amount of the correspondence involved here crossed in the mail.

during the period of suspension as well as the period of termination.

Respondent complied with the terms of the original arbitration award, but has not complied with the "substitute page" aspects of the amended award. A Federal lawsuit contesting the validity of that portion of the award with its direction that the Respondent undertake make whole provisions as to Williams is currently pending in the United States District Court for the District of Nevada.

(b) Analysis and conclusions respecting deferral

The Respondent argues the allegations as to Bernard Williams should be deferred. The General Counsel opposed such deferral.

The Board in *Spielberg Mfg. Co*., 112 NLRB 1080 (1955), established specific criteria for deferral to arbitration awards: (1) that the proceedings were fair and regular; (2) that all parties agreed to be bound; and (3) that the decision not be repugnant to the purpose and policies of the Act. The Board also requires that the issue involved in the unfair labor practice have been adequately considered by the arbitrator. *Olin Corp*., 268 NLRB 557 (1984). The Board in *Dubo Mfg. Corp*., 142 NLRB 431 (1963), determined it would defer any action on cases until the completion of the grievance-arbitration process, if the matter were already within that process.

An initially important issue is the Respondent's refusal to comply with the "substitute page award now in litigation in the Federal court. Is such a refusal and ongoing litigation fatal to the deferral motion? The Board in *Malrite of Wisconsin, Inc*., 198 NLRB 241 (1972), enfd. sub nom. *Electrical Workers IBEW Local* 1715 v. NLRB, 494 F.2d 1136 (D.C. Cir. 1974), deferred under *Spielberg* and dismissed a complaint where an arbitrator had issued an appropriate award, but the employer refused to comply and the union was seeking court enforcement of the award. The Board held that court enforcement of arbitration awards was preferable to invocation of the Boards multistep unfair labor practice litigation process and deferred to the arbitrators award.[31] Given this decision, the Federal court litigation is irrelevant to the issue of deferral.

There is no contention or evidence to suggest that the proceedings underlying the arbitration were other than fair and regular. While the parties continue to dispute what arbitration award, i.e., the original or the "substituted page award, is the final and binding award, there is no contention that the final award, once judicially identified, binds all parties.

The Board in *Olin Corp*, supra, held that an arbitrator adequately considers the unfair labor practice issue, if the contractual issue is factually parallel to the unfair labor practice issue and if the arbitrator is presented generally with the facts relevant to resolving the unfair labor practice. The Board also held that, once it is shown the unfair labor practice case concerns a matter already arbitrated, the burden of demonstrating defects in the arbitral process shifts to the party seeking to overturn the arbitral process or award. That burden is on the General Counsel. It is clear from the results of the arbitration that the Union convinced the arbitrator that there was no just cause for Williams termination. It appears that the evidence submitted dealt with the discipline history of the grievant and the applicable rules and practices relevant to the asserted reason for the Respondent's termination as well as the grievants conduct at relevant times.

Given the burden placed on the General Counsel and the General Counsels failure to address any aspect of the arbitration process save in the briefest of argument at trial, I find that the General Counsel has not proved that sufficient parallelism did not exist between the unfair labor practice allegations and the grievance or proved that important facts were not presented to the arbitrator. Accordingly, I find that the award is not flawed or rendered unsusceptable to deferral on that ground.

The issue of whether or not the arbitration award is repugnant to the purpose and policies of the Act requires consideration. In a sense there are two potential awards: the original "Arbitral Award which was complied with by the Respondent and the "substituted page award which has not been complied with and remains under judicial consideration in the Federal court. The difference between the two however, is one of remedy only. In essence each award finds the Respondent violated the contract and directs Bernard William's reinstatement. The two differ only respecting whether the Respondent is further obligated to undertake certain "make whole remedies including backpay. The Board has long held the absence of these remedial elements in an arbitrators award do not, per se, render the award repugnant to the Act. *Olin* reasserts the Boards view that it will not require an arbitrators award to be totally consistent with Board precedent. Applying that Board standard here, I find the arbitrators award, under either alternative resolution of the collateral dispute respecting which of the two versions is the true and binding decision of the arbitrator, is not repugnant to the policies and purposes of the Act.

I find therefore that the arbitration decision of the arbitrator respecting Bernard Williams meets the Boards standards for deferral and that the allegations respecting Williams should be deferred to it.

(2) Summary and conclusion respecting Bernard Williams

Given all of the above and having found that the arbitration decision meets the Boards standards for deferral under *Spielberg* and *Olin,* I shall defer the Bernard Williams allegation in the complaint to the arbitration decision. Accordingly, consistent with the Boards procedures in such deferral situations, I shall dismiss the allegation and not consider its underlying merits.

c. The second discharge of Albert Crockett

The General Counsel alleges in the complaint in Case 28–CA–12595 at paragraphs 6, 7, and 8 that the Respondent violated Section 8(a)(3) and (1) of the Act by denying Albert Crockett leave on January 11 and terminating him on January 14, 1994, because of his solidarity and support for the other employees, because of his other union and protected concerted activities and in order to discourage employees from engaging in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Complaint subparagraphs 6(e)

[31] *Malrite* was modified in *Electronic Reproduction Service Corp*., 213 NLRB 758 (1974), in circumstances involving total repudiation of the contract, a situation not present here. Although *Electronic Reproduction* was overturned by the Board in *Suburban Motor Freight, Inc*., 247 NLRB 146 (1980), this portion of the decision was presumably not affected. *Suburban* was itself overruled in *Olin*, supra.

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and (f) further assert that Crockett's request for leave was denied:

> [B}ased upon an asserted reason (i.e., shortage of replacement workers) brought about as a direct result of the the Respondent's having unlawfully discharged the employees [terminated on January 5 as discussed here]. These acts are inherently destructive of the rights guaranteed employees by Section 7 of the Act.

The Respondent admits the conduct alleged but denies both the ascribed motivations and that its conduct violated the Act. It is appropriate to deal with the two alleged adverse actions separately below.

(1) The denial of Crockett's request for leave

The General Counsel has two theories underlying his claim that Crockett was wrongfully denied his request for leave of absence. The first is a classical theory of adverse action based on animus against Crockett for his protected activities to that date. Assuming that the General Counsel has sustained a prima facie case as to this theory under the Boards *Wright Line*[32] analysis, it is incumbent on the Respondent to meet its burden of proof that the denial would have taken place, even if Crockett had never engaged in any union or other protected activities. For the reasons appearing below, I find that the Respondent has done so.

Initially, I accept the proposition that the Respondent would not under any circumstances have granted a leave of absence to any driver at a time when it was desperate for and could not obtain sufficient drivers. While the Respondent had not denied leaves of absence on this basis in times past, the contract explicitly provided for such denials and, as the Respondent argues and the record amply demonstrates, the situation was extraordinary and the shortage of drivers extreme. This finding under *Wright Line* sustains a dismissal of the General Counsels theory of a violation irrespective of whether or not the General Counsel has, in fact, sustained his prima facie case.

While it is not necessary to go further in dismissing the theory presented, the propriety of the Respondent's action in denying the leave request must be judged based on what it knew at the time it denied it. The Respondent's decisionmaking agents were completely aware at the time the leave was denied that Crockett's leave was requested because of his "wishes to show solidarity with the group of discharged employees. (R. Br. at 44.) It seems to me it would be an incongruous result to require the Respondent to grant leaves of absence to employees who, it well knew, would then use the leave, in effect, to engage in sympathy strikes in support of fellow employees discharged by it.

The General Counsel has also pled the unusual theory of a violation quoted above from complaint subparagraphs 6(e) and (f). There the General Counsel asserts that, since the shortage of drivers, on which the Respondent relies as a contractual basis for denying the leave of absence, was caused by the Respondent's wrongful discharge of those drivers, the Respondent should be estopped from using its own wrong doing as a justification or excuse for further improper actions. Thus the General Counsel is arguing that the shortage of drivers caused by the terminations—found violative of the Act supra—may not be invoked by the Respondent in defense of its denial of the leave of absence.

[32] *Wright Line*, 251 NLRB 1083 (1980).

The General Counsels estoppel argument is novel and is supported by no citations of authority. While it has a certain attractive logical aspect, I am unwilling to find the secondary or consequent events caused by an employers unfair labor practices to be so tainted by the original unfair labor practice actions that they may not constitute business reasons for that employers subsequent actions. Were such consequences intended, planned or part of a scheme or devise to terminate employees, they might be considered as tainted or invalid. Here where the wrongful mass terminations were consummated before Crockett was even offered reinstatement and without Board precedent for such an analysis, I decline to accept the theory propounded.

Given all the above, and on the basis of the record as a whole, I find that the General Counsel has not sustained his allegation that Crockett was wrongfully denied his request for leave. This allegation of the complaint will therefore be dismissed.

(2) The termination of Crockett on January 14

The General Counsel again has two theories respecting the allegation that the Respondent improperly terminated Crockett on January 14, 1994. As with the allegation respecting denial of leave, the General Counsels first theory is that the Respondent took action based on animus against Crockett because of his protected activities up to that time. The Respondent strenuously opposes this contention. There is no doubt that Crockett's activities included protected activities galore and that the Respondent surely had very substantial hostility towards him as a result of those activities. I further find however that the Respondent was attempting to be cautious and "by the book in its approach to Crockett and terminated Crockett solely for the reason it asserts in its defense: i.e., that he did not call or show up for 3 consecutive working days when he was obligated to work given the denial of his leave. The Respondent viewed such a failure as a basis for discharge consistent with past practice and the contract and accordingly terminated Crockett. I explicitly reject the broader animus contentions of the General Counsel. To this extent the primary theory of the General Counsel is rejected.

There is a secondary theory discussed by both the General Counsel and the Respondent at trial and on brief. Thus the General Counsel argues on brief at 29:

> Finally, it is submitted that Crockett . . . was discharged for becoming an unfair labor practice striker which is protected activity despite a no strike clause because [of] the serious nature of the Respondent's unfair labor practices makes the unfair labor practice strike an exemption to the no-strike clause and should be so found by the Administrative Law Judge.\16\

\16\ *Mastro Plastics Corp. v. NLRB*, 214 F.2d 462 (2d Cir. 1954), affirmed 350 U.S. 270 (1956); *Studio 44*, 284 NLRB 597, 599 (1987); *Goodie Brand Packing Corp.,* 283 NLRB 673, 674 (1987).

The Respondent points out in the opening portion of its brief at 2:

> Resolution of the Crockett case is inextricably tied to the facts and law applicable to all of the other alleged discriminatees, except Bernard Williams. The legal nexus, as articulated by the General Counsel, is hat if the 70 were unlawfully discharged, Crockett's refusal to return to work after being informed on January 11, 1994, that his grievances had been

sustained and he had been reinstated, was protected by his right to engage in an unfair labor practice strike, protesting the discharge of his colleagues.

I have found, supra, that the 70 employees terminated because of their activities on January 5 were illegally discharged. The discharge of so many employees in the circumstances presented here is, I find, a serious unfair labor practice. There is no dispute and I find that Crockett declined to return to work after January 11, 1994, in solidarity with the discharged employees and that the Respondent knew this was the reason for his refusing to come to work at the time the Respondent fired him. Crockett was therefore engaged in an unfair labor practice strike during the period January 6 through at least the date of his discharge[33] and the Respondent knew or well should have known that fact.

As an unfair labor practice striker Crockett was not restricted by the no-strike provisions of the contract.[34] His refusal to go to work was therefore a strike and protected activity for which he could not be discharged.[35] Nor could the Respondent, knowing as it did that Crockett was not at work due to his unfair labor practice striker withholding of his services, properly invoke the "no call, no show provisions of the contract to discharge him because he failed to either show up for work or call in.

The Respondent's termination of Crockett, an unfair labor practice striker, for failing to call in or report to work violated Section 8(a)(1) of the Act and I so find. This portion of the General Counsels complaint is sustained.

d. Summary and conclusions respecting the alleged unfair labor practices

Summarizing the findings made above, I have found as follows. I have found the employees listed in the amended complaint paragraph 5(a), as set forth in Appendix I of this decision, were terminated because of their January 5, 1995 activities. I found those activities to be protected concerted activities which evolved into a strike on and after 12:15 p.m. I found the strike was not unprotected under the doctrine affirmed by the Court in *Emporium Capwell*.

I further found that the strike was prohibited under the terms of the no-strike clause of the collective-bargaining agreement between the Union and the Respondent. I therefore found the activities of the striking employees was unprotected. Further, however, I found the strike of the employees was abandoned and the Employer condoned the unprotected activities of the employees by the conduct of the Respondent's agent, Hilton ,in the vacant lot before the Respondent's agent, Richard Isola, terminated the employees for their activities that day. I found therefore that the Respondent was estopped from relying on the condoned or forgiven conduct of the employees to justify its discharge of them.

Having found the employees had engaged in protected concerted activity and that all unprotected activities engaged in by them had been forgiven and could not be the basis for their discharge, I found that the Respondent's termination of them violated Section 8(a)(1) of the Act as alleged in the complaint. Moreover, I found that employee Harold Clemons, an employee included in the group of 70 employees described here, did not engage in any refusal to work or strike activity of any kind and, for this reason, the Respondent's termination of him violates the Act irrespective of the analysis of the refusal to work described above.

I have found that the complaint allegation respecting Bernard Peter Williams is parallel to a grievance and arbitration award which meets the Boards standards for deferral. Accordingly, I have deferred the Williams allegations to that award and will therefore dismiss the allegation.

I have found that the General Counsel has failed to prove the allegation of the complaint that Crockett was improperly denied a leave of absence by the Respondent on January 11, 1994. I shall therefore dismiss this allegation.

I have found that the Respondent did not terminate Albert Crockett on January 14, 1994, because of animus directed to his protected activities on and before January 11, 1994. Rather I found that the Respondent terminated Crockett on January 14, 1994, because he had failed to call in or show up for work for the three proceeding workdays.

I further found that during the period after January 5 and through the time of his termination Albert Crockett was an unfair labor practice striker who was known by the Respondent to be withholding his services from the Respondent in solidarity with the employees terminated for their conduct on January 5, 1994. I found that Crockett's conduct was not limited or prohibited by the no-strike language of the contract and was therefore protected activity. I found therefore that the Respondent discharged Crockett because of his protected activity in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

I shall order the Respondent to offer the employees terminated as a result of their activities on January 5 as set forth in appendix I of this decision and Albert Crockett, in writing, immediate, full, and unconditional reinstatement to the positions they occupied until discharged, if such positions no longer exist, they shall be offered substantially equivalent positions, without prejudice to their seniority and other rights and privileges they would have enjoyed if they had not been discharged, and to make them whole for any loss of earnings and benefits in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *Florida Steel Corp*., 231 NLRB 651 (1977), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Isis Plumbing Co*., 138 NLRB 716 (1962).

I shall further order the Respondent to delete and expunge from its records all references to the termination of these employees and notify each of them in writing that this has been done and further assure them that the fact of their discharge will not be used against them in future.

The Respondent shall determine all payments it owes to employee benefit funds in the manner set forth in *Merryweather Optical Co*., 240 NLRB 1213, 1216 fn. 7 (1970). Further, the Respondent shall reimburse its employees in the manner set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for any expenses

[33] There is no question that "serious unfair labor practice circumstances continued through the period. At no relevant time were any employees reinstated nor were any of the grievances processed by the Respondent.

[34] *Mastro Plastics v. NLRB*, 350 U.S. 270 (1956).

[35] *Abilities & Goodwill*, 241 NLRB 27 (1979).

resulting from the Respondent's failure to make these payments.

In view of the widespread and egregious nature of the Respondent's violations of the Act, I shall also include a broad cease-and-desist order. See *Hickmont Foods*, 242 NLRB 1357 (1979).

Because a notice should inform employees of their rights under the Act in the context of the violations found and, further, because of the fact that the significant portion of the violations of the Act found here deal with discrimination which was improper only because unprotected conduct by employees was condoned, there is a significant danger that a normal notice will mislead employees respecting their rights under the Act. In this highly unusual situation, I have substantially expanded the explanatory portions of the notice in an attempt to insure that those who read it realize that the actions of the employees at relevant times were protected only because of the condonation of the Respondent.

On the basis of the above findings of fact and the record as a whole, I make the following

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating the employees set forth in Appendix I of this decision because of their protected concerted and union activities and/or because the Respondent believed they had engaged in protected concerted and union activities at the Respondent's premises on January 5, 1994.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Albert Crockett on January 14, 1994, because of his protected concerted and union activities as an unfair labor practice striker.

5. The allegation of the consolidated complaint respecting employee Bernard Peter Williams' will be deferred to the arbitration award respecting the Union's grievance and the complaint allegation as to him will be dismissed without consideration of its merits.

6. The allegation of the complaint that the Respondent wrongfully denied Albert Crockett a leave of absence is without merit and will be dismissed.

7. The above unfair labor practices constitute unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]